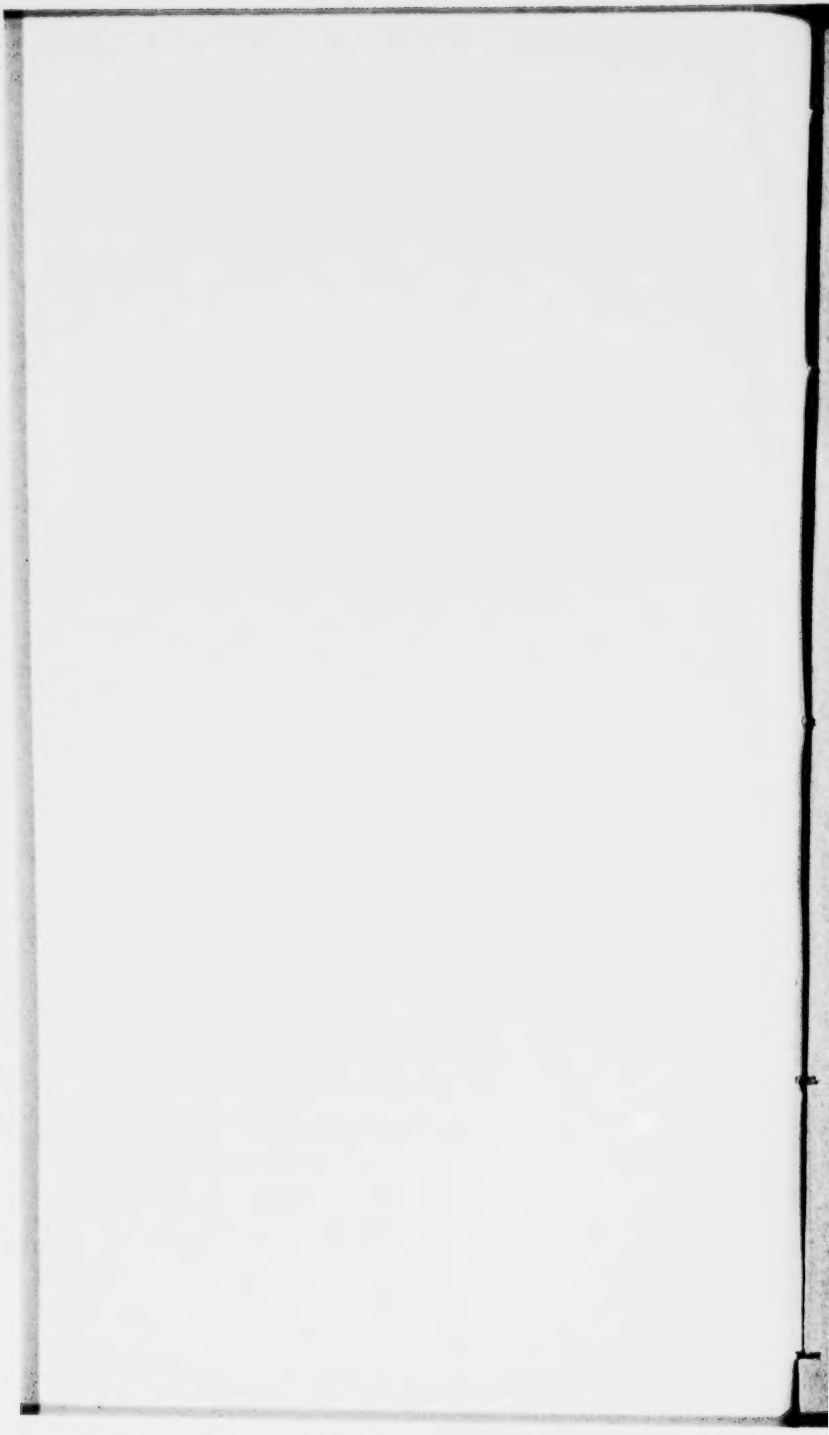

CLERK'S COPY. 8347

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No ~~219~~ 66.

JOHN H. EVANS, AS RECEIVER, &c., PLAINTIFF IN ERROR,

vs.

ANDREW J. NELLIS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 23, 1901.

(18,088.)

8348

(18,088.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 278.

JOHN H. EVANS, AS RECEIVER, &c., PLAINTIFF IN ERROR,

vs.

ANDREW J. NELLIS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate of the United States circuit court of appeals for the second circuit	1	1
Statement of facts	1	1
Questions of law	5	4
Judge's certificate	6	4
Clerk's certificate	7	4

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1901.

1 United States Circuit Court of Appeals, Second Circuit.

JOHN H. EVANS, as Receiver, &c., Plaintiff in Error,
vs.
ANDREW J. NELLIS, Defendant in Error.

Certification of Questions to the Supreme Court under the Act of March 3, 1891.

This cause came before this court upon writ of error to the circuit court of the United States for the northern district of New York. As to a certain question of law therein, this court desires the instruction of the Supreme Court.

Statement of Facts.

That the Inter-State Loan and Trust Company is a corporation created and organized under and by virtue of the general laws of the State of Kansas July 22, 1885, and as such was authorized to transact business as a land mortgage company; that in or about the month of November, 1897, E. B. Crissey commenced an action against the said The Inter-State Loan and Trust Company in the United States circuit court for the district of Kansas, first division, to which court jurisdiction in that behalf duly appertained; that said action was duly commenced by the issue of a summons to said company; that said summons was duly served upon the said company, and that said company duly appeared in said suit by attorney and defended the same, and that such proceedings were afterwards had in said action that on the 31st day of December, 1897, a judgment was duly given and made in and by said court in said action in favor of the said plaintiff and against the said company, in

2 and by which judgment it was decided, adjudged and decreed that there was due and owing to the plaintiff therein from and by the said company the sum of $6,792.20 and $56.45 costs, and that the plaintiff therein have and recover said sum from the said company, with interest thereon from said date at the rate of six per cent. per annum, and that the said plaintiff have execution therefor against the said company; that thereafter an execution against the property of the said The Inter-State Loan and Trust Company was duly issued out of the said court upon said judgment for the said sum of $6,792.20 and the costs as aforesaid, directed to the United States marshal for the district of Kansas, and that thereafter the said marshal duly returned said execution wholly unsatisfied for the reason that no property, real or personal, belonging to said company could be found whereon to levy the same; that thereafter and on or about the 9th day of June, 1898, upon the application of the said E. B. Crissey, the plaintiff herein was duly appointed receiver of the said The Inter-State Loan and Trust Company by

the circuit court of the United States for the district of Kansas, first division, to which said court jurisdiction therein duly appertained, and has duly qualified and acted as such; that thereafter and on or about the 9th day of February, 1899, an order was duly given and made in and by said circuit court of the United States for the district of Kansas, first division, by which order it was considered, adjudged, ordered and decreed that the said John H. Evans, as receiver, proceed against all or any of the stockholders of the Inter-State Loan and Trust Company, from whom, in his judgment, a recovery can be had to collect all of their liability as stockholders in said company, a copy of which order is hereto annexed and marked Exhibit A, and which copy the plaintiff herein prays may be considered as part of his complaint as if herein set forth in full; that the

3 defendant is a citizen of the State of New York, and prior to the month of November, 1897, became a stockholder of said corporation and the owner of 602 shares of the capital stock thereof of the par value of $100 a share, and has ever since remained a stockholder and the owner of said shares. At the time when the defendant became a stockholder of said corporation, and from that time ever since, it was provided by the constitution of the State of Kansas (sect. 2, article XII) as follows: "Dues from corporations" (organized and existing under the laws of the State of Kansas) "shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations nor corporations for religious or charitable purposes." At the time the defendant became a stockholder of said corporation it was provided by the General Statutes of Kansas of 1868 (sections 32 and 44) as follows:

"SEC. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"SEC. 44. If any corporation, created under this or any general statute of this State, except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be

4 brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders

at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

By a law of Kansas enacted January 11, 1899, sections 32 and 44 aforesaid were repealed, and by sections 14 and 15 it was provided as follows:

"SEC. 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows:

SEC. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which such execution was issued, or to the judge thereof, a receiver shall be appointed, to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them."

"SEC. 15. That section 46, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows:

SEC. 46. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors."

The present action was brought in the circuit court of the United States for the northern district of New York by the receiver of the said The Inter-State Loan and Trust Company, appointed as aforesaid, against the defendant to recover the sum of $60,200, alleging

his liability as a stockholder and the owner of the said 602 shares of the said corporation.

Upon the foregoing facts this court desires instructions upon the following questions:

Questions of Law.

1st. Are sections 14 and 15 of the Laws of Kansas of 1899 valid legislation in view of the provision of the constitution of the
6 State of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than "dues from corporations"?

2nd. Do sections 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas?

3rd. Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the circuit court of the United States for the northern district of New York?

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal, etc., the foregoing questions of law are by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

WM. J. WALLACE,
U. S. Circuit Court.
E. HENRY LACOMBE,
U. S. Circuit Judge.
N. SHIPMAN,
U. S. Circuit Judge.

7 UNITED STATES OF AMERICA, } ss:
Second Circuit, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit,

Do hereby certify that the foregoing certificate in the case entitled John H. Evans as receiver, etc., *vs.* Andrew J. Nellis, was duly filed and entered of record in my office by order of said court on the 15th day of March, 1901 and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, this 16th day of March, 1901.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] United States circuit court of appeals, second circuit. John H. Evans, as receiver, &c., plaintiff in error, *vs.* Andrew J. Nellis, defendant in error. Certificate. United States circuit court of appeals, second circuit. Filed Mar. 15, 1901. William Parkin, clerk.

Endorsed on cover: (Certificate.) File No. 18,088. U. S. C. C. of appeals—2nd circuit. Term No. 278. John H. Evans, as receiver &c. plaintiff in error, *vs.* Andrew J. Nellis. Filed March 23rd, 1901.

No. 66.

Opinion of Circuit Court.

Office Supreme Court U. S.
FILED
NOV 6 1902
JAMES H. McKENNEY,
Clerk.

Filed Nov. 6, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 66.

JOHN H. EVANS, AS RECEIVER, ETC., PLAINTIFF IN ERROR,

vs.

ANDREW J. NELLIS.

OPINION OF COXE, DISTRICT JUDGE, REPORTED IN 101 FED. REP., 923.

(18,088.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4661

EVANS *v.* NELLIS.

(Circuit Court, N. D. New York, May 23, 1900.)

COXE, *District Judge:*

The Interstate Loan and Trust Company was organized in 1885. The defendant became a stockholder in 1889. The first judgment was recovered against the company in 1896, on which $2,000 is still due. The second judgment was recovered in 1897 and execution was returned unsatisfied in January, 1898. The plaintiff was appointed receiver of the company in June, 1898. During this time and until January, 1899, when the act giving the receiver a right to recover the additional liability of stockholders was passed, the General Statutes of 1868 of Kansas were in force. In order to ascertain the effect of the subsequent legislation it is necessary to understand what were the rights of the parties when that legislation took effect. Section 32 of the Statutes of 1868 provided that if an execution were returned *nulla bona* against a corporation an execution might issue by order of the court against any of the stockholders to an extent equal in amount to the amount of stock owned by him, or the plaintiff in the execution might proceed by action to charge the stockholders with the amount of his judgment. On the 6th of January, 1898, therefore, the plaintiffs in the Crissey and Streeter suits had a right of action against the defendant, but only for the amount of their judgments. Any defense by way of counter-claim or set-off which the defendant had against Crissey or Streeter was available to him in such action. By section 41 he was given an action of contribution against the other stockholders, so that had he been required to pay the Crissey and Streeter judgments he could have compelled the other stockholders to pay their proportionate shares.

In the recent decision of Whitman *v.* Bank, 176 U. S., 559; 20 Sup. Ct., 477; Adv. S. U. S., 477, 44 L. Ed., —, the Supreme Court has settled most of the vexed questions regarding the organic and statute law of Kansas as it existed prior to the amendments of 1899. The following propositions may be deemed decided:

First. The words of the Kansas constitution providing that "dues from corporations shall be secured by individual liability" are not merely directory to the legislature but of themselves declare the stockholders' liability and to this extent are self-executing.

Second. The constitution and the statutes must be taken together as forming one body of law, the statutes prescribing the mode of enforcing the constitutional liability. "Whatever else may be said about the remedy it is direct, certain and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations."

Third. The liability of the stockholder, though statutory in its origin, is contractual in its nature. In other words, each of the stockholders entered into a contract, authorized by statute, with each other and with the creditors of the corporation that debts established by judgment against the corporation might be collected of them to an amount equal to the amount of their stock, provided there was no corporate property upon which to levy. They also agreed that one stockholder paying such judgment might have contribution from all the others.

Applying the law of the Whitman case directly to the facts now before the court, it will be seen that the defendant was only under obligation to pay the Crissey and Streeter judgments and such other debts as were reduced to judgment. If he had a defense against any of these judgment

creditors he could assert it. If he were required to pay he could himself compel other stockholders to contribute. Having paid all judgment creditors, his obligation ceased. (Hoyt *v.* Bunker, 50 Kans., 574; 32 Pac., 126). On the other hand, Crissey and Streeter were vested with certain important and valuable rights under the contract between them and the stockholders. They as individuals could enforce their judgments against any stockholder wherever found. They were not called upon to share the amount so recovered with simple contract creditors or to pay any part thereof to a receiver or as costs and fees of the officers of the court. If one of these judgment creditors were the first to sue a solvent stockholder whose liability was equal to the amount of the judgment, his debt was safe. This, then, was the situation when the law of 1899 went into operation. The new law wrought a sweeping and radical change. New liabilities are created and new remedies are provided. Section 23, as amended, provides for the appointment of a receiver upon an execution being returned *nulla bona*. The receiver so appointed shall close up the affairs of such corporation and shall immediately institute proceedings against all the stockholders to collect unpaid subscriptions and the additional liability. The money thus collected shall be held for the benefit of all the creditors, and shall be used under the direction of the court to pay the costs and expenses of the receivership and all claims against such corporation. Any judgment obtained by the receiver against a stockholder who has not paid the amount due from him may be assigned to the stockholders who have paid and enforced by them against the delinquent stockholder for his proportionate amount. Section 46, as amended, provides that the stockholders shall be liable to the creditors for unpaid subscriptions and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be an asset of the corporation to be collected by a receiver for the benefit of all the creditors Under

the former law the stockholder's additional liability was an obligation to pay the judgment creditor who was unable to collect his debt from the corporation. Under the present law this liability is an asset of the corporation for the benefit of all the creditors. Under the former law the right to collect his judgment rested with the judgment creditor. He could act immediately. Nothing but his own laches could impair this right. Under the latter law the judgment creditor has no advantage over the most negligent and supine contract creditor. All alike must trust to the discretion of the receiver; if he fails in duty the debt of the judgment creditor is lost. In one case the entire indebtedness of the stockholder was applied without diminution upon the judgment. In the other case the entire amount collected may by order of the court be devoted to the payment of the receiver's commissions, costs and expenses. Under the former law the stockholder could avail himself of any defense, counter-claim or set-off he might have against the pursuing creditor. These defenses no longer exist. Under the former law, when he had paid the judgment creditors, the liability of the stockholder ended; now he must pay the entire amount to the receiver even though it be twice the amount necessary to pay the corporation's debts. Whether any of the balance be returned or not depends largely upon the economy, prudence and honesty of the receiver. In short, the new law destroys, absolutely, all rights which the judgment creditor, *qua* a judgment creditor, possessed; takes away all right of independent action and compels him to share *pro rata* with all the creditors. As to the stockholder, it deprives him of defenses which would defeat the former action, compels a full payment when a partial payment was oftentimes sufficient and devotes the amount recovered to the payment of obligations not mentioned in the former statute. It is not difficult to suppose a case where a stockholder absolutely safe from pursuit under the former act may be financially ruined under the present act. For

instance, where a stockholder was sued for, say $10,000, by the only judgment creditor. If the judgment creditor owed the stockholder the sum of $10,000 it is manifest that he could not recover. Or, assume a situation where the entire amount recovered is consumed in paying the expenses of the receivership. In the first of these instances the receiver takes money which could not be collected under the former act; in the second, he applies the money collected to the payment of obligations which are created for the first time by the act of 1899, and which are not "dues from corporations" (Ward *v.* Joslin (C. C.), 100 Fed., 676). It is true that under the prior statute in certain circumstances an equal amount might be recovered, but the stockholder might discharge his entire obligation by paying much less than the full amount. Under the present law his liability is increased by compelling him to pay the full amount and by applying it in payment of an entirely new class of obligations.

Since the trial of this action the supreme court of Kansas, in the case of Woodworth *v.* Bowles, 60 Pac., 331, has declared unconstitutional similar provisions of the Kansas statute relating to the liability of stockholders in banks. Section 55 of chapter 47 of the act of 1897, provides that the receiver shall, after the expiration of one year, institute the proper proceedings in the name of the bank for the collection of the liability of the stockholders to be distributed *pro rata* among the creditors. No action by creditors against stockholders shall be maintained unless it shall appear to the satisfaction of the court that the receiver has failed to begin the action as required by law. The court held that if the statute were given a retroactive construction it was invalid because it deprived creditors of their right to maintain proceedings against the stockholders or, at least, postponed that right for a year. The court says:

"The act of 1897 does not assume to abrogate the contract or relieve the stockholder from liability, but it does assume to

do two other things: First, to suspend for one year the pursuit by the creditor of the special remedy afforded by the laws in existence at the time of the making of the contract; and, second, to deprive the creditor of such remedy altogether if the receiver at the end of the year should institute an action for him and for the other creditors, in which last-mentioned case the fund collected by the receiver is to be distributed *pro rata* between all the creditors. * * * If, however, the new enactment, although not designed to effect the substantial right, does nevertheless embarrass or substantially delay the creditor in the collection of the debt, it will be held to have impaired the obligation of the contract. We deem section 55 of the law of 1897, in its application to existing contracts between creditors and stockholders, to be an enactment of the latter kind. * * * If the receiver should institute an action and collect the liability, even though every stockholder should be solvent and should discharge his liability in full, the creditor might, nevertheless, not receive full payment of his claim. He must share with other creditors. * * * Vigilance and diligence on the part of a creditor in the pursuit of one or the other of his remedies in one or another of the contingencies stated, might avail to secure the payment of his claim in full. Under the statute as it now exists, vigilance and diligence may avail nothing."

It is thought that the logic of this opinion when applied, in similar circumstances, to the law of 1899 in its retroactive aspect, must result in a similar judgment. In Bronson *v.* Kinzie, 1 How., 311; 11 L. Ed., 143, the supreme court decided that where a mortgage contained a power to the mortgagee to sell on breach and thereby pay the debt, a subsequent law giving the mortgagor 12 months to redeem and prohibiting the property from being sold for less than two-thirds its appraised value, so altered the remedy as to impair the obligation of the contract (Barnitz *v.* Beverly, 163 U. S., 118; 16 Sup. Ct., 1042; 41 L. Ed., 93). It is true that a law will not ordinarily be declared unconstitutional on the objection of one whose interests are not injuriously affected by the objectionable features. If the accusations against the

act in question were only those which might be presented by the judgment creditors, whose rights have manifestly been invaded, there might be more difficulty in declaring it invalid. There, are, however, exceptions to the general rule which are stated by Judge Cooley to be found in cases "where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others" (Cooley, Const. Lim. (4th ed.), 219). It would, indeed, be a strange anomaly if the statute in question were held valid when attacked by stockholders and invalid when attacked by judgment creditors. Such a construction would lead to endless confusion and injustice. But, as has been seen, the contractual rights of the stockholders have been impaired equally with those of the judgment creditors. It is undoubtedly true that whatever belongs merely to the remedy may be changed as the legislature may direct, but the court cannot believe that this familiar rule is applicable to a law which makes such fundamental changes in the terms of the contract.

The case of Hill *v.* Insurance Co., 134 U. S., 515; 10 Sup. Ct., 589; 33 L. Ed., 991, is relied on by the plaintiff. The point decided is well stated in the syllabus:

"A State statute which confers upon a judgment creditor of a corporation, when execution on a judgment against the corporation is returned unsatisfied, the power to summon in a stockholder who has not fully paid the subscription of his stock, and obtain judgment and execution against him for the amount so unpaid, in no way increases the liability of the stockholder to pay that amount; and, inasmuch as he was before then liable to an action at law by the corporation to recover from him such unpaid amount at law, as well as to a suit in equity, in common with other similar stockholders, to compel contribution for the benefit of creditors, no substantial right of the stockholder is violated."

It is manifest that the case involved merely a change of remedy. The defendant was liable at law to pay the amount of his subscription for which he had given his notes to the company. Then came the law permitting a judgment creditor to collect the amount due but changing in no way the extent of the liability. The court says:

"His undertaking was to pay each and all of his notes on demand, and it was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf—such remedy not increasing the debtor's liability."

That the liability of the defendant has been increased is pointedly illustrated by the fact that whereas under the pre-existing statute the recovery could be for the sum of $16,000 only, the original complaint demands judgment in the sum of $60,200, and there is no doubt that the existing law permits such a recovery. The injustice of such a situation is impliedly conceded by the plaintiff, who at the trial voluntarily consented to limit the amount of the recovery to $16,000. In the brief the plaintiff's counsel asks the question:

"What difference does it make to the defendant whether he pays $16,000 to the plaintiff or to the individual creditors of the Interstate Loan & Trust Company?"

The answer is:

"None, but it makes a difference of $44,200 whether judgment is entered under the old law or under the new, and this is the proper test to apply when considering the question of the defendant's liability."

The plaintiff, admitting that certain parts of the act, if given a retroactive effect, may be decided to be unconstitutional, contends in the brief as follows:

"The act of January 11, 1899, authorizes a recovery against the defendant to the amount of $60,200. We ask a

recovery in this case of about $16,000. Conceding, for the sake of the argument, that the statute is unconstitutional in so far as it authorizes a recovery to the full amount of the liability of the defendant, is there any valid reason why the $16,000 that is constitutional cannot be separated from the $60,200 which is unconstitutional; will not the intent of the legislature be carried out thereby?"

The difficulty with this reasoning, as it seems to the court, is that it assumes that there is some provision of the act of 1899 which authorizes a recovery of $16,000. Where is the provision? All former provisions limiting the recovery to the amount of the judgments have by this act been swept away. There is no alternative provision for an action at law in favor of the judgment creditors or by the receiver to recover the amount of their judgments. The provision seems to be mandatory. "The receiver shall immediately institute proceedings against all stockholders to collect * * * the additional liability of such stockholders equal to the par value of the stock held by each." The suit is brought under this section of the law, and if the law falls the suit falls with it. There is no other provision authorizing an action at law in favor of the receiver for the amount of the judgments. The concessions of the receiver cannot affect the question of the constitutionality of the law. A plaintiff suing under a void law cannot make it valid by agreeing to receive one-fourth of the amount demanded. If the law, as a retroactive measure, be clearly invalid, and the defendant insists upon the point, it is not easy to see how the court can avoid pronouncing the judgment of invalidity because the plaintiff consents to make the recovery no more onerous than it would have been under a former statute which has been repealed.

It follows, therefore, that the law in question impairs the obligation of the defendant's contract if construed to act retroactively, and to that extent is invalid. The complaint is dismissed.

No. 2994. 66

By. of Stenson

Filed April 8, 1904.

BRIEF OF PLAINTIFF IN ERROR.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 725.

JOHN H. EVANS, AS RECEIVER, &c., PLAINTIFF IN ERROR,

vs.

ANDREW J. NELLIS, DEFENDANT IN ERROR.

L. A. STEBBINS, TOPEKA, KANSAS,
O. J. EVANS, TOPEKA, KANSAS,
P. TECUMSEH SHERMAN, 59 WALL ST., NEW YORK,
S. B. STANTON, 59 WALL ST., NEW YORK,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT
OF THE UNITED STATES.

JOHN H. EVANS, as Receiver,
Plaintiff in Error,
vs.
ANDREW J. NELLIS,
Defendant in Error.
No. 278.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This case comes to this court on a certificate from the United States Court of Appeals for the Second Circuit. The statement of facts and questions of law arising thereon are as follows:

That the Inter-State Loan and Trust Company is a corporation created and organized under and by virtue of the general laws of the State of Kansas July 22, 1885, and as such was authorized to transact business as a land mortgage campany; that in or about the month of November, 1897, E. B. Crissey commenced an action against the said The Inter-State Loan and Trust Company in the United States Circuit Court for the District of Kansas, First Divi-

sion, to which court jurisdiction in that behalf duly appertained; that said action was duly commenced by the issue of a summons to the said company; that said summons was duly served upon the said company, and that said company duly appeared in said suit by attorney and defended the same, and that such proceedings were afterwards had in said action that on the 31st day of December, 1897, a judgment was duly given and made in and by said court in said action in favor of said plaintiff and against the said company, in and by which judgment it was decided, adjudged and decreed that there was due and owing to the plaintiff therein from and by the said company the sum of $6,792.20 and $56.45 costs, and that the plaintiff therein have and recover said sum from the said company, with interest thereon from said date at the rate of six per cent. per annum, and that the said plaintiff have execution therefor against the said company; that thereafter an execution against the property of the said The Inter-State Loan and Trust Company was duly issued out of the said court upon said judgment for the said sum of $6,792.20 and the costs as aforesaid, directed to the United States marshal for the district of Kansas, and that thereafter the said marshal duly returned said execution wholly unsatisfied, for the reason that no property, real or personal, belonging to said company could be found whereon to levy the same; that thereafter, and on or about the 9th day of June, 1898, upon the application of the said E. B. Crissey, the plaintiff herein was duly appointed receiver of the said The Inter-State Loan and Trust Company by the Circuit

Court of the United States for the District of Kansas, First Division, to which said court jurisdiction therein duly appertained, and has duly qualified and acted as such; that thereafter and on or about the 9th day of February, 1899, an order was duly given and made in and by said Circuit Court of the United States for the District of Kansas, First Division, by which order it was considered, adjudged, or dered and decreed that the said John H. Evans, as receiver, proceed against all or any of the stockholders of the Inter-State Loan and Trust Company, from whom, in his judgment, a recovery can be had to collect all of their liability as stockholders in said company, a copy of which order is hereto annexed and marked Exhibit A, and which copy the plaintiff herein prays may be considered as part of his complaint as if herein set forth in full; that the defendant is a citizen of the State of New York, and prior to the month of November, 1897, became a stockholder of said corporation and the owner of 602 shares of the capital stock thereof of the par value of $100 a share, and has ever since remained a stockholder and the owner of said shares. At the time when the defendant became a stockholder of said corporation, and from that time ever since, it was provided by the constitution of the State of Kansas (Sec. 2, Art. 12) as follows:

"Dues from corporations" (organized and existing under the laws of the State of Kansas) "shall be secured by individual liability of the stockholders to an additional amountequal to the stock owned by each stockholder, and such other means as shall be provided by law; but such in-

dividual liabilities shall not apply to railroad corporations nor corporations for religious or charitable purposes."

At the time the defendant became a stockholder of said corporation it was provided by the General Statutes of Kansas of 1868 (Secs. 32 and 44) as follows:

"SEC. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"SEC. 44. If any corporation, created under this or any general statute of this State, except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided

equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

By a law of Kansas enacted January 11, 1899, sections 32 and 44 aforesaid were repealed, and by sections 14 and 15 it was provided as follows:

"Sec. 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows:

Sec. 22. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which such execution was issued, or to the judge thereof, a receiver shall be appointed to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them."

"Sec. 15. That section 46, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows:

Sec 46. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors."

The present action was brought in the Circuit Court of the United States for the Northern District of New York by the receiver of the said The Inter-State Loan and Trust Company, appointed as aforesaid, against the defendant to recover the sum of $60,200, alleging his liability as a stockholder and the owner of the said 602 shares of the said corporation.

Upon the foregoing facts this court desires instructions upon the following questions:

QUESTIONS OF LAW.

1st. Are sections 14 and 15 of the Laws of Kansas of 1899 valid legislation in view of the provision of the constitution of the State of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than "dues from corporations"?

2d. Do sections 14 and 15 aforesaid contravene the constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas?

3d. Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the Circuit Court of the United States for the Northern District of New York?

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal, etc., the foregoing questions of law are by the Circuit Court of Appeals for the Second Circuit hereby certified to the Supreme Court.

Specification of Errors Relied Upon.

1. The learned trial court erred in holding that sections 14 and 15 of the act of January 11, 1899, of the State of Kansas contravened the constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of the Inter-State Loan and Trust Company by subjecting him to liabilities other than "dues from corporations."

2. The trial court erred in holding that sections 14 and 15 aforesaid contravened the constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a Kansas corporation.

3. The trial court erred in holding that plaintiff, as the receiver of a Kansas corporation, appointed by a Kansas court, was not entitled to maintain the action in the Circuit Court of the United States for the Northern District of New York.

Question I.

We are in some doubt as to the meaning of the first question propounded by the court. Under the law as it existed prior to the passage of the act of January 11, 1899, stockholders in Kansas corporations were liable to the creditors thereof in an amount equal to the amount of stock held by each, together with any amount unpaid thereon, and this liability was collected by the creditor proceeding directly against the stockholder in an action at law.

Whitman v. Bank, 176 U. S. 559;
44 L. Ed. 591;
Abbey v. Dry Goods Co., 44 Kan, 415.

By the act under which this action was commenced, receivers of defunct corporations are authorized to collect this liability and distribute the same among all the creditors. The Inter-State Loan and Trust Co. was incorporated and a receiver was appointed therefor and defendant became a stockholder therein before the passage of the act of January 11, 1899.

It would seem that, by the first question propounded by the court, it is sought to inquire whether the rights of the stockholder are being impaired and his liability increased because, possibly, the money which may be recovered from him will be applied in whole or in part to the expenses of the receivership; or, it might be applied in whole or in part to the payment of claims against the receiver which are not "dues from corporations" within the meaning of section 2 of article 12 of the constitution of the State of Kansas. While, as stated, we are in some doubt as to the meaning

of this first question, we are led to believe that this is the meaning from the following paragraph in the opinion of the trial court:

"It is not difficult to suppose a case where a stockholder absolutely safe under the former act may be financially ruined under the present act. For instance, where a stockholder was sued for, say, $10,000 by the only judgment creditor. If the judgment creditor owed the stockholder the sum of $10,000 it is manifest that he could not recover. Or, assume a situation where the entire amount recovered is consumed in paying the expenses of the receivership. In the first of these instances the receiver takes money which could not be collected under the former act; in the second he applies the money collected to the payment of obligations which are created for the first time by the act of 1899, and which are not "dues from corporations." (Ward v. Joslin, [C. C.] 100 Fed. 676.) It is true that under the prior statute in certain circumstances an equal amount might be recovered, but the stockholder might discharge his entire obligation by paying much less than the full amount. Under the present law his liability is increased by compelling him to pay the full amount and by applying it in payment of an entirely new class of obligations."

Evans v. Nellis, 101 Fed. Rep. 920, *925*.

If this is the true meaning of the first question propounded by the court, we think the answer depends so largely upon the same considerations which must determine the answer to the second question that it is hardly practical to separate its full discussion from the discussion of the second question. We will therefore state briefly the reasons why we believe the first question should be answered in the negative, leaving the full discussion of such

reasons, with the authorities to support the same, to be stated under the discussion of the second question.

The first question should be answered in the negative—

(*a*) Because under the old law a stockholder was liable to the full amount of his stock for the debts of the corporation.

(*b*) He cannot possibly be injured by being compelled to pay the sum for which he was liable under the old law to the representative of all the creditors instead of paying the same direct to some individual creditor.

(*c*) If the liabilities of the Inter-State Loan and Trust Company are less than his liability as a stockholder, and he would thereby under the old law have been liable for a less sum than is herein sued for, this is a question of fact; and where the constitutionality of an act turns on a question of fact the burden rests upon the party relying upon the unconstitutionality to affirmatively show the fact, and no such showing exists in this case.

Wellington, *Petitioner*, 16 Pick. (Mass.) 87, *95 to 97*;
Jones v. Black, 84 Ala. 540, *543*;
Franklin County v. State, 24 Fla. 55;
Stevens v. Stevens, 20 Ky. (4 T. B. Monroe) 526;
Saroney v. Burrow, 17 Fed. Rep. 591;
In re Stecknoth, 7 N. W. Rep. 223;
Craig v. Church, 88 Pa. St. 42.

(*d*) If there are any claims against John H. Evans, as receiver, which are not "dues" within the meaning of the constitution of Kansas, and to the payment of which in part the money recovered in this action might be applied, and if such fact is significant in determining the rights of

the stockholder, then the burden of proof rests upon the stockholder to affirmatively show such fact; and there is no such showing in this case. See cases last above cited.

(*e*) If a recovery in this case should be limited to the actual ascertained indebtedness of the Inter-State Loan and Trust Company, for which the stockholder would have been liable under the old law, (as it was suggested in the court below that the recovery might be limited, Evans v. Nellis, 101 Fed. Rep. 920, *927*), the stockholder cannot possibly be injured even though a portion of the money might be used to pay the expenses of the receivership. His liability is not thereby augmented to any extent, nor is the recovery increased.

(*f*) If one resists the payment of a just demand, he is always liable for the payment of certain costs and expenses incident to the recovery of such just demand, and he cannot complain that such charge thereby increases his liability in some measure. Nellis might voluntarily have paid the just debts of the corporation to the amount of his liability, and thereby have relieved himself from any possible charge for costs and expenses.

Bank v. Milling Co. 59 Kan. 654.

(*g*) One who is not injured by the alleged unconstitutionality of an act cannot raise the question of its validity. (See authorities cited under discussion of the second question.) And if the recovery in this case is limited to the amount for which Nellis would have been liable under the old law, he is not injured.

(*h*) An act unconstitutional in part should be enforced as far as possible.

Keokuk Co. v. City of Keokuk, 95 U. S. 80.

Question II.

(A) Does the act of January 11, 1899, violate that provision of section 10, article 1, of the constitution of the United States, prohibiting the States from passing any law "impairing the obligation of contract?"

(B) If the act in question does so violate the constitution of the United States, is the defendant in a position to raise this question?

A.

It has been held by the Supreme Court of Kansas that an act similar to the one in question which changed or attempted to change the manner of collecting the stockholder's liability from a proceeding brought by the individual creditor to one maintained by the receiver on behalf of all the creditors of banking corporations, was invalid as to the creditors of the bank under the provision of the constitution of the United States referred to. (Woodworth v. Bowles, 61 Kan. 569.) And it was upon the authority of this case largely that the learned trial court held the act in question to be unconstitutional.

Evans v. Nellis, 101 Fed. Rep. 920, 925.

As this question, however, arises under the constitution of the United States, and not under or as an interpretation of the constitution or statutes of the State of Kansas, this court and not the Supreme Court of Kansas is the final au-

thority on this question. The opinion in Woodworth v. Bowles, 61 Kan. 569, is entitled to such consideration only as its intrinsic merit as an authority may command. It is in no wise binding.

A Case Directly in Point.

We think the case of Hill v. The Merchants Mutual Insurance Co., 134 U. S. 515, is directly in point as sustaining the validity of the act of January 11, 1899.

On March 3, 1857, the legislature of Missouri incorporated the Washington Insurance Company, and provided that it should be exempt from the operations of the general corporation laws of Missouri. On February 9, 1859, the legislature of the same State incorporated the Excelsior Insurance Company, and provided that it should have the same rights, privileges and restrictions as were conferred upon the Washington Insurance Company. By reason of its being exempt from the general corporation laws, it left the unpaid subscription to the corporation without any specific remedy provided for the collection of the same. The defendant, Hill, subscribed for sixty-four shares of the capital stock of the Excelsior Insurance Company, of the par value of $100 per share, leaving $4,800 unpaid on the stock. Subsequently, and in 1879, the legislature of Missouri passed an act concerning the collection of the stockholders' liability, almost identical with section 32 of the Kansas law as such law existed prior to the passage of the act of January 11, 1899. Subsequently a creditor moved for execution under this section against Hill. The execu-

tion was ordered and appeal taken to the Supreme Court of Missouri (86 Mo. 466), and being there affirmed was taken to the Supreme Court of the United States and again affirmed in the case above cited.

The court holds that under the law as it existed in Missouri as applied to the Excelsior Insurance Company at the time of its incorporation, the only method of collecting the unpaid subscription was by bill in equity.

"The result of this construction of the charter of the insurance company is, that prior to the passage of the act of 1866, which took effect March 19, 1866, no specific remedy was prescribed for the creditor seeking to reach the unpaid subscription of stockholders. But it was open to them to proceed by bill in equity."

The court will thus observe that the change in this case was from a remedy on behalf of all the creditors to one running to each individual creditor; whereas in the case at bar, the change is from a remedy to the individual creditors to one running to all the creditors; but this does not affect the principle involved. The court affirmed the Supreme Court of Missouri, and says, among other things:

"But neither the company nor its stockholders had any vested right in that particular remedy. They could only insist that the extent of their liability should not be increased."

And again the court says:

"The statute of 1879 did not enlarge this liability . . . . . While under the original charter of the company he was liable to a suit in equity, under the statute of 1879 he was liable to be proceeded against by a notice and motion in the action in which judgment was rendered against

the corporation. In either mode he had opportunity to make defense."

And again the court says:

"It was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf, not increasing the debtor's liability."

This is the whole case in a nutshell. In this connection it is important to note that the constitution of Kansas, article 12, section 1, being the section immediately preceding the one creating the liability sought to be enforced, provides:

"Corporations may be created under general laws, but all such laws may be amended or repealed."

The court below seemed to assume that this case would be controlling if the liability of the defendant had not been increased, (Evans v. Nellis, 101 Fed. Rep. 926, 927), but, as we shall see hereafter, if there has been any increase of the liability of defendant by the act in question, it is not sought to recover such increase, and the defendant remains uninjured.

The Legislature May Properly Add the Receiver to the Persons Authorized to Sue.

But it is not necessary in this case to overturn the doctrine of the case of Woodworth v. Bowles, 61 Kans. 569, in order to sustain the validity of the act in question as between the receiver and the stockholder. The rights of creditors were directly drawn in question in the case of

Woodworth v. Bowles. The creditors were asserting their rights under the constitution of the United States. No creditor is here asserting any rights. On the contrary, it appears that the only creditor that the record discloses caused this receiver to be appointed, and this method of collection to be pursued. Now, assuming that all of the rights of the individual creditors of the Inter-State Loan and Trust Company remain as they existed prior to the act in question, it is still entirely consistent with such rights for the legislature to add to the list of persons authorized to sue for this liability, the representative of all the creditors. No individual creditor had any vested right to the liability of the stockholder; he had the right of diligence only. His right only became vested after he had commenced an action against the stockholders. Now, if he chooses to neglect these rights, if he elects to be dilitory, if he takes no steps to convert his contingent right into a vested one, is even he injured by permitting the receiver to sue and collect the liability, provided the receiver is diligent and actually commences his suit before any individual creditor has commenced?

"The judgment creditor of an insolvent corporation who first moves in conformity with paragraph 32, chapter 23, General Statutes of 1889, to charge a stockholder of the corporation on his liability under the statute, acquires a priority of right to recover against such stockholders, with which a creditor subsequently moving cannot rightly interfere."

Wells v. Robb, 43 Kan. 201.

Now, can it be said that this contingent right of each

individual creditor is so substantial that it has been impaired under the constitution of the United States in a case where a receiver representing all of the creditors has actually commenced his action before the individual creditors began theirs? There is no claim or contention in this case that any individual creditor has sued the defendant. The rights of the individual creditor were so intangible under the old law that a stockholder might pay voluntarily to another creditor after he had been sued, but before summons were served upon him, although he had full knowledge of the pendency of the suit, and thereby defeat a recovery in the pending action. (Munson v. Warren 65 Pac. [Kan.] 222.) Suppose the act in question had merely authorized the receiver to sue in case the individual creditors failed to do so, and had preserved in form all of the rights of the creditors under the old law, and then, suppose that this action had been commenced by the diligent receiver before the dilitory creditors had commenced, would there be any serious question about the validity of the law?

B.

The Stockholder Cannot Complain.

But let us take a step further. Let us assume, for the sake of the discussion, that Woodworth v. Bowles was correctly decided. Let us assume further that the legislature had no power to authorize the receiver to sue, even where the individual creditors neglected to sue, and so assuming,

let us inquire if the stockholder is in a position to raise any of these questions.

The following are a few extracts from the leading authorities, showing that only those who are injured by an act can raise the question of its constitutionality:

"Nor will the court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

Cooley's Const. Lim. (6th Ed.) 196.

"It is only when some person attempts to resist the operation of the act and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. (Wellington, Petitioner, 16 Pick. 98. *A legislative act may be entirely valid as to some classes of cases and clearly void as to others.*"

People v. C. I. R. R., 89 N. Y. 75, *93*.

"Again, we are told that the funding act is void, because it impairs the obligation of the contract made by the State with the holders of the coupons for interest, under the act of April 25, 1867. It is enough to say that no such question arises in these cases. No holder of those coupons, if indeed any such holder now exists, (which is at least doubtful), is here complaining that he is injured in any way by the funding act; and it is well settled that the courts will never pronounce a statute unconstitutional because it may impair the rights of others not complaining. The statute is assumed to be valid until some one complains whose rights it invades."

Antoni v. Wright, 22 Gratt. (Va.) 833, *857*.

"Only those whose rights would be prejudiced by the enforcement of an unconstitutional act will be heard to question its validity."

6 Am. & Eng. Enc. L., (2d. ed.) 1090.

"A law unconstitutional because it impairs the obligation of contract is only null so far as the rights of those persons are concerned the obligations of whose contracts are thereby impaired. As to all other rights and all other persons, it is entitled to full force and effect." (Syllabus, p. 727.)

"Only a person having a right and interest to invoke the unconstitutionality of a law as affecting himself, his property and his rights, can present such a defense."

Moore v. The City of New Orleans, 32 La. Ann. 725, 746.

"One cannot be heard to say a law is invalid and unconstitutional upon a ground which in no way affects his rights. One who seeks to obtain the privilege of selling liquor as a beverage cannot question the constitutionality of the law which denies him that privilege upon the ground that it forbids the sale of liquors even for religious or medicinal purposes, as prescriptions are not filled in a bar room, nor the communion table supplied from such places." Par. 5, Syllabus, p. 424.)

Burnside v. Lincoln County Court, 86 Ky. 423.

"A party must be prejudiced by the enforcement of a statute or the courts will not listen to his objections to its constitutionality." (Par. 5, Syllabus, p. 682.)

Marshall v. Donovan, 73 Ky. 681, *691*.

NOTE: In this case the legislature of Kentucky passed a law authorizing taxation for school purposes, but excluded citizens of African descent from the operations of the law and the benefits of the school provided for. A white man resisted the levy of the tax on the ground that the law was unconstitutional as being a discrimination against the blacks, and in the opinion the court says: "It is sufficient in this case that the negro is asserting no such claims, and that the appellant, who belongs to the favored

race or class, cannot raise the question as to the constitutionality of the manner in which the school fund and the moneys raised by taxation for school purposes are expended or distributed."

"A white person indicted by a grand jury composed wholly of persons of the white race cannot complain because negroes were excluded by statute from the jury. Only those who are prejudiced by an unconstitutional law can complain of it." (Syllabus.)

Commonwealth v. Wright, 79 Ky. 22.

"Not only is it true that a court will not, as a general rule, pass upon a constitutional question and decide a statute to be invalid unless a decision upon that very point becomes necessary, but it is also a rule that a court will not listen to an objection made to the constitutionalty of a statute by a party whose rights it does not affect, and who has, therefore, no interest in defeating it. (Cooley Const. Lim., 5th Ed., 197.) A party who seeks to have an act of the legislature declared unconstitutional must, says the Supreme Court of Alabama, in Jones *et al.* v. Black *et al.*, 48 Ala. 540, not only show that he is or will be injured by it, but he must also show how and in what respect he is or will be injured and prejudiced by it. Injury will not be assumed; it must be shown."

Com. Franklin Co. v. State, 24 Fla. 54.

NOTE.—In this case certain election officers resisted the performance of certain duties imposed by statute, on the ground that the statute was repugnant to the state constitution.

"Where the rights of citizens have been invaded by any unwarrantable, arbitrary exercise of the legislative power, it is the duty of this court to afford the needed redress and to declare the act a nullity. But at whose instance shall this be done? Plainly those whose rights are injuriously

affected by the act complained of, their representatives or assigns, and *they only* can call upon the court to do this."

Williamson v. Carleson, 51 Me. 449, *453*.

NOTE.—The words "*they only*" are italicised in the opinion.

"The legislature has power to pass an act providing that a turnpike shall be laid out as a highway, and that the supreme judicial court shall appoint commissioners to estimate and award the amount to be paid to the turnpike company as damages for taking their property, and also to determine and decree in what proportion this amount shall be paid by the counties in which the turnpike lies; and such counties cannot object to the constitutionality of such act on grounds which affect merely abutters or towns, nor call in question the decision of the legislature as to how much property of the company is necessary for the public use." (Syllabus.)

Hingam v. County of Norfolk, 6 Allen (Mass.), 353.

"It may be well doubted whether a formal act of legislature can ever with strict legal propriety be said to be void; it seems more consistent with the nature of the subject and the principles applicable to analagous cases to treat it as voidable. But whether or not the case can be imagined in which an act of the legislature can be deemed absolutely void, we think it quite clear that when such act is alleged to be void on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars and as against those persons whose rights are thus affected. *Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, there-

fore, concurs with well established principles of law in the conclusion that such act is not void, but voidable only; and it follows as a necessary legal inference from this position that this ground of avoidance can be taken advantage of by those only who have the right to question the validity of the act, and not by strangers. To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power; and to this extent only, therefore, are courts of justice called on to interpose.

"Besides, and this is only argument tending to the same result, if the legislative act may or may not be valid according to circumstances, courts are bound by the plainest principles of exposition, as well as by the just deference to the legislature, to presume the existence of those circumstances which will support it and give it validity. For instance, if an act of the legislature appears on the face of it to be an encroachment on the rights of any persons, but would nevertheless be valid if passed with the consent of those persons, the court is bound to presume that such consent was given. And this presumption must prevail in favor of the validity of the act until the contrary is shown, and shown too by the person having an interest in the maintenance of the rights supposed to be thus injuriously affected, and having the right to call for the interposition of the court for their support and protection; and a stranger can have no right to appear and contest the validity of the act upon such ground." Wellington, Petitioner, 16 Pick. (Mass.) 87, *95–97*.

"An act of assembly provided for the consolidation of the city of Pittsburg and surrounding territory into one city; to be submitted to a vote of the citizens in three designated districts, and if either district decided in favor of consolidation an election was to be held for municipal officers, but if either district should reject consolidation such district should have no representation. *Held*, that

the submission of the question to a vote was not unconstitutional."

"If the act be unconstitutional, private parties cannot interfere by bill to have it so declared, unless on account of some damage to them. Injury to the public peace or interests in the territory to be incorporated is not sufficient." (Syllabus.)

Smith v. McCarthy, 56 Pa. St. 359.

"It is an approved rule that no one can take advantage of the unconstitutionality of an act who has no interest in and is not affected by it." (Syllabus.)

State v. Snow, 3 R. I. 64.

"No one but the party or the person claiming under him whose right is affected by the act of the legislature can plead its unconstitutionality."

De Jarnett v. Haynes, 23 Miss. 600, *603.*

"An act apportioning school funds to a school at which tuition fees are charged for pupils able to pay, should not be declared unconstitutional on the return of the commissioner to an application requiring him to pay out such funds, (1) because such a ruling is not necessary to the determination of the case, and (2) because, no individual rights of the school commissioner being involved, it does not seem that he should be permitted to question the constitutionality of an act of the legislature directing his official action." (Syllabus.)

Ex-parte Florence School, 43 S. C. 11.

"Courts do not lend ear to objections urged against the constitutionality of a statute by parties whose rights are not affected, and who therefore possess no interest in having the court pronounce upon the question."

Smith v. Inge, 80 Ala. 283, *286.*

"A party who seeks to have an act of the legislature declared unconstitutional must not only show that he is, or will be injured by it, but he must also show how and in

what respect he is or will be injured and prejudiced by it. Injury will not be presumed; it must be shown."

Jones v. Black, 48 Ala. 540, *543*.

"Only the person whose rights are affected and who has some right and interest in the defeat of an act can raise a question as to its unconstitutionality."

Airy v. People, 21 Colo. 144.

"One cannot be heard to complain that a statute which discriminates between classes of persons in the imposition of burdens of municipal control and taxation is unconstitutional as being a denial of the equal protection of the laws, unless he belongs to one of the classes discriminated against."

Kansas City v. Union Pac. R. R., 59 Kan. 427;
Affirmed by this court, 176 U. S. 114.

"One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity."

Red River Valley Nat'l Bank v. Craig, 181 U. S. 548, *558*.

"A voter who does not allege that he ever was registered or ever made any application to be registered, but who, so far as appears, may have been entitled to apply for registration, is not in a position to impugn the constitutionality of a statute for registration on the ground that it in effect required a longer residence in the country than was required by the constitution of the State, and otherwise unreasonably impeded the exercise of the constitutional right of voting."

Wiley v. Sinkler, 179 U. S. 58.
Duer v. Small, 4 Blatchf. 263;
Reid v. Town of Matonton, 80 Ga. 755;
Farneman v. Mt. Pleasant Cem. Asso., 135 Ind. 344, *347*.
Small v. Hodgen. 11 Ky. 16;
Stevens v. Stevens, 20 Ky. (4 T. B. Monroe), 626;
Eakins v. Eakins, 2 S. W. Rep. 285;

McKinney v. State; 3 Wyo. 319;
16 L. R. A. 710;
Louisville S. V. & T. Co. v. Louisville & N. R. Co.,
92 Ky. 233;
14 L. R. A. 579;
Prince v. Croker, 166 Mass. 347;
32 L. R. A. 610;
Town of Pierrefont v. Loveless, 72 N. Y. 211.

Will the Defendant be Injured by the Maintenance of This Action?

It is contended by the defendant that he would be injured because section 14 authorizes a recovery to the full amount of his stock liability, whereas under the old law he would only be liable for the actual amount of the indebtedness of the corporation, and, further, because a portion of the money herein recovered might be applied to the payment of the costs and expenses of the receivership, or to the payment of some liability of the Inter-State Loan and Trust Company not comprehended within the term "dues" in section 2, article 12, of the constitution of the State of Kansas; and further, because he might have defenses against actions brought by individual creditors that would not be available in this action.

In reply we say:

(a) That where the constitutionality of an act as to a particular case turns on a question of fact, the burden rests upon the one who avers the unconstitutionality to prove the fact. Every presumption of fact in the absence of proof will be in favor of the constitutionality of the act.

(b) Assuming that the facts exist which would render the act unconstitutional in so far as it attempts to authorize a recovery to the full amount of the stock liability of the defendant, there can still be no constitutional impediment to a recovery to such amount as the record affirmatively shows the defendant to have been liable for under the old law, because—

(c) The act of January 11, 1899, does not require the receiver to collect the full amount from each, although it does authorize such collection; and because—

(d) An act unconstitutional in part should be enforced as far as possible.

(a) **Burden of Proof Upon the Stockholder.**

This action was brought by the receiver to recover the full amount of the stock liability of the defendant, $60,200. The record does not affirmatively show what the liabilities of the Inter-State Loan and Trust Company were. The record in this court shows affirmatively only $6,722.20, with interest and certain costs. The record in the Court of Appeals showed affirmatively liabilities to the amount of $16,000. (Evans v. Nellis, 101 Fed. Rep. 920, 927.) But the amount is wholly immaterial for the purpose of determining the questions of law involved.

In the court below, it was practically conceded upon the oral argument that the recovery against the defendant might be limited to such amount as the record affirmatively showed was the indebtedness of the Inter-State Loan and Trust Company. (Evans v. Nellis, 101 Fed. Rep. 920, 927.)

This concession was, however, too liberal to the defendant; was not necessary under the law, and is now withdrawn, for the reason that the burden of proof rests upon the stockholder, he being the one who avers the unconstitutionality of the act, to show affirmatively this and all other facts which he relies upon to show that he is injured, and that therefore the act is invalid as to him in this case.

"If the legislative acts may or may not be valid according to circumstances, courts are bound by the plainest principles of exposition, as well as by the just deference to the legislature, to presume the existence of those circumstances which will support it and give it validity. For instance, if an act of the legislature appears on the face of it to be an encroachment on the rights of any persons, but would nevertheless be valid if passed with the consent of those persons, the court is bound to presume that such consent was given. And this presumption must prevail in favor of the validity of the act until the contrary is shown, and shown too by the persons having an interest in the maintenance of the rights supposed to be injuriously affected and having a right to call for the interposition of the court for their support and protection."

Wellington, Petitioner, 16 Pick. (Mass.) 87, *95–97*.

This is an exhaustive and well-considered opinion by the famous Chief Justice Shaw, of Massachusetts. Jeremiah Mason appeared in opposition to the constitutionality of the act therein questioned.

"A party who seeks to have an act of the legislature declared unconstitutional must not only show that he is or will be injured by it, but he must also show how and in what respect he is or will be injured or prejudiced by it. Injury will not be presumed, it must be shown."

Jones v. Black, 48 Ala. 540, *543*.

"A party who seeks to have an act of the legislature declared unconstitutional must, says the Supreme Court of Alabama in Jones *et al.* v. Black *et al.*, 48 Ala. 540, not only show that he is or will be injured by it, but he must also show how and in what respect he is or will be injured or prejudiced by it. Injury will not be assumed; it must be shown."

Franklin Co. v. State, 24 Fla. 55.

"It lies on the party asserting it [the unconstitutionality of an act] to aver and show it."

Stevens v. Stevens, 20 Ky. (4 T. B. Monroe) 526.

Further, to the same effect, see—

Saroney v. Burrow, 17 Feb. Rep. 591;
In re Stecknoth, 7 N. W. Rep. 223;
Craig v. Church, 88 Pa. St. 42'

The court will presume for the purpose of sustaining the constitutionality of the act that the liabilities of the Inter-State Loan & Trust Company were equal to the amount of the stock liability of the defendant.

This same rule of law disposes of each and all of the other objections of the stockholder as above outlined. He objects that a portion of this money might hereafter be used to pay the costs and expenses of the receivership. If such use would be illegal under the circumstances, we are bound to presume that the court, where the receivership is pending, will follow the law, and will order the distribution of the money according to law. Can an act of the legislature be said to be unconstitutional because we are bound to presume that some court will hereafter disregard the law?

The stockholder objects to the maintenance of this

action because he says some portion of the money which is recovered might be applied to the payment of liabilities for which he would not be liable at the suit of an individual creditor. In the first place there could be no such liabilities. In the second place, if there could, the burden rests upon the stockholder to show affirmatively that there are, in fact, such liabilities. And even when such showing has been made there can be no presumption that the court would use any portion of this money to pay such liabilities contrary to law.

The defendant further objects because he says he might have defenses if sued by the individual creditor. The learned trial court seemed to lay considerable emphasis on this point, (Evans v. Nellis, 101 Fed. Rep. 920, *925*). But again we find a complete answer to this suggestion in the rule now under discussion, that where the unconstitutionality of an act in a certain case as to a certain person depends upon a question of fact, the burden of proof rests upon the one averring the unconstitutionality to show the fact, and there is no showing that the defendant had any defense when sued by any or all of the individual creditors of the company. Acts of the legislature cannot be declared invalid upon conjectures, upon hypothetical cases, or upon presumptions of fact; the fact must be averred and proven.

(b) No Constitutional Impediment to a Partial Recovery.

But assuming, for the sake of discussion, that we must presume the liabilities of the Inter-State Loan & Trust Company, for which the defendant was liable under the old law, to be limited to such sums as the record affirmatively shows them to be, what possible constitutional impediment can there be to a recovery of such sum as the defendant was concededly liable for under the old law?

We propounded the following question to the learned trial court, upon the theory of a partial recovery, and upon the theory that the liabilities of the company were such only as affirmatively appeared by the record:

"What difference does it make to the defendant whether he pays $16,000 to the plaintiff, or to the individual creditors of the Inter-State Loan & Trust Company?"

And the court answered the question as follows:

"None. But it makes a difference of $44,200 whether judgment is entered under the old law or under the new, and this is the proper test to apply when considering the question of the defendant's liabilities."

Evans v. Nellis, 101 Fed. Rep. 920, *927*.

We respectfully submit the answer of the learned trial court was wholly fallacious and was no answer at all. If judgment is entered under the new law for $16,000, the identical sum for which the defendant was liable under the old law, he is not injured by the sum of $44,200, nor any other sum. The fundamental error of the trial court was in assuming that judgment could not be entered for $16,-

000 when an action was brought for $60,200 under a statute which attempted to authorize such recovery.

(c) The Act of January 11, 1899, Does Not Compel a Full Recovery.

The trial court seemed to have proceeded upon the theory that the receiver had no power under the act of January 11, 1899, to recover less than the full amount of the stock liability. This is certainly a strange and unusual construction. Suppose the case of a receiver proceeding to collect stock liability created after the passage of the act of January 11, 1899, and, therefore, a case where no question arises as to the validity of the law. Now suppose that a receiver should commence an action against a stockholder who is liable for $60,200, but should only ask judgment for $16,000, is it possible that the complaint would be demurrable? Is it possible that the defendants would successfully contend that no recovery could be had because the receiver did not choose to ask a recovery to the full amount of the liability? It is confidently affirmed that before such a construction would be placed upon the statute the meaning would have to be expressed therein so clearly and beyond all doubt as to leave no possibility for any other construction. And we submit that no such construction can be placed on the act of January 11, 1899.

(d) The Act Should be Enforced as Far as Possible.

Assuming, for the sake of the discussion, that the liabilities of the Inter-State Loan and Trust Company are less

than the liabilities of the defendant, and assuming that the act requires and does not merely permit a full recovery, and assuming that the act is therefore in part invalid, under the constitution of the United States, it would still be the duty of the court to enforce the act as far as possible, and render judgment for such sum as would not deprive the defendant of any of his rights under the constitution of the United States.

An act unconstitutional in part will be enforced as far as possible.

"Where a part of a statute is unconstitutional, that fact does not authorize the court to declare the remainder void also, unless all of the provisions are connected in subject-matter depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other."

Cooley, Const. Lim. (6th Ed.), 210, 211.

Can it be said that the legislature of Kansas would not have passed the act in question had it contemplated an effort on the part of receiver to collect less than the whole amount of the liability of the stockholder? To so interpret the statute would certainly be to ascribe a manifest absurdity to the intention of the law-making body.

"A legislative act may be entirely valid as to some classes of cases and clearly void as to others. In any such case the constitutional law must operate as far as it can."

Cooley, Const. Lim. (6th Ed.), 213.

"If there are any exceptions to this rule, they must be in cases only where it is evident from a contemplation of the statute and of the purpose to be accomplished by it that it would not have passed at all except as an entirety, and

that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others."

Cooley, Const. Lim. (6th Ed.), 214.

The general purpose of the act of January 11, 1899, was to transfer the collection of the stockholders' liability from individual creditors to the receiver, and to divide collections more equally and equitably among the creditors.

How can it be said that the general purpose of the legislature will be defeated by collecting $16,000 instead of $60,200?

An interesting case in point on the question of partial unconstitutionality is that of Keokuk Company v. The City of Keokuk, 95 U. S. 80. In this case, the city of Keokuk, Iowa, passed an ordinance providing that all grounds then lying, or which might thereafter be made, between Water Street in said city and the middle of the channel of the Mississippi River should be declared a wharf. And the ordinance further imposed, or attempted to impose, certain fees for all vessels anchoring within the designated territory. This was indisputably and concededly unconstitutional in so far as it attempted to impose any duty of tonnage for the mere right of entering the port of Keokuk, it being a violation of that provision of the tenth section of the first article of the constitution of the United States which provides that—

"No state shall, without the consent of congress, lay any duty of tonnage."

It was held by the Supreme Court in this case that in

so far as the ordinance imposed charges for the use of a valuable wharf actually constructed by the city, it was valid. As to the duty of the court called upon to enforce a law partially unconstitutional, the Supreme Court says:

"Statutes that are constitutional in part only will be upheld as far as they are not in conflict with the constitution, provided the allowed and prohibited parts are separable. We think a severance is possible in this case. It may be conceded that the ordinance is too broad, and some of its provisions are unwarranted. When these provisions are attempted to be enforced a different question may be presented."

Keokuk Co. v. City of Keokuk, 95 U. S. 80.

Here is a case where the constitutional and unconstitutional parts of the act are not only contained in the same section, but in the same sentence. The act was constitutional according to distance and amount, as it were. That is, it was constitutional down to a certain point on the river bank, and further on it was unconstitutional. So in this case, if it becomes necessary to uphold the constitutionality of the act in question, it may be deemed to be constitutional up to the amount of the debts of the company, although it should be held to be unconstitutional beyond that sum.

Payment to the Receiver Would Fully Protect the Stockholder from Further Attack.

If a recovery is had in this case, and if the defendant pays to the receiver, will he thereby be protected from further attack at the suit of individual creditors? If he

will not; if he might still be compelled to pay the same sum upon the same liability a second time, it is clear that he may justly complain that his rights are being impaired.

Under the old law, if a stockholder voluntarily paid any *bona fide* creditors the amount of his liability, he thereby became relieved from any further liability to any other creditor.

"A stockholder in an insolvent corporation against which judgment has been rendered may voluntarily discharge his statutory liability to his creditors by making payment to one of them without awaiting the issue and return of an execution *nulla bona* and the making of an order to enforce his liability; and if such voluntary payment is made in good faith it will operate as a bar to proceedings by other creditors to compel payment a second time."

Bank v. Milling Co., 59 Kan. 654.

Now, the receiver in this case is the statutory agent for all of the creditors, and it is clear that a voluntary payment to the statutory agent of all of the creditors, to be distributed among all of the creditors, would relieve the stockholder from any further liability. If such voluntary payment would relieve him from liability, an involuntary payment would have like effect, and for a greater reason. It is manifestly more equitable that the liability should be collected by the receiver for the benefit of all of the creditors than the grab game which existed under the old law where the swiftest creditor who, by hook or crook, first filed his action, thereby appropriated the entire liability, to the exclusion of all other creditors. Surely the legislature has power to create a statutory agent for the more

equitable distribution of this fund, and when payment is made to such statutory agent, either voluntarily or involuntarily, the individual creditor who has failed to commence any action until after such payment is made, surely has no right to complain and no right of his has been invaded under the constitution of the United States, though Woodworth v. Bowles (61 Kan. 559) shall be approved by this court.

We respectfully submit that if a recovery in this case be had for the same sum and no more than the defendant was liable for under the old law, he is in no wise injured; that no possible right under the federal constitution has been impaired, and that the first two questions propounded by the court should be answered in the negative.

Question III.

MAY A RECEIVER MAINTAIN AN ACTION IN A JURISDICTION OTHER THAN THAT IN WHICH HE WAS APPOINTED?

The following cases in point have passed through this court without serious question:

Hawkins v. Glenn, 131 U. S. 319;
Glenn v. Liggett, 135 U. S. 533;
Glenn v. Marbury, 145 U. S. 499;
The Great Western Telegraph Co. v. Purdy, 162 U. S. 329;
First National Bank of Concord v. Hawkins, 174 U. S. 364.

The rule is thus stated by Smith on Receivers, the latest and best work on receivers:

"The great weight of authority in this country at the present time may be stated in general terms as follows:

. . . . . .

"He (a foreign receiver) will be permitted to sue and defend as a foreign receiver in all courts of other States than that in which he was appointed, on the principle of comity, except where the rights of citizens of the State of the forum are prejudiced thereby, or where it would be in contravention of the policy of such State."

Smith Rec., p. 167.

Booth v. Clark, 17 How. 322, in so far as it can be construed as limiting the right of the receiver to sue in a foreign jurisdiction, has for a long time been undergoing a process of being overruled by being "distinguished." It is manifestly out of harmony with the ever-increasing tendency to bind the States together into one harmonious union. The business relations between the citizens and institutions of the several States are so intimate that to deprive those competent to sue in one jurisdiction from suing in another without special reasons is manifestly absurd and out of harmony with the trend of events. We desire to direct special attention on this point to the following cases:

Howarth v. Angle, 162 N. Y. 179;
Howarth v. Ellwanger, 86 Fed. Rep. 54;
Howarth v. Lombard, 175 Mass. 570;
Relfe v. Rundel, 103 U. S. 222;
26 L. Ed. 337;
Hale v. Harden, 95 Fed. Rep. 747, *771–6.*

See, also, to the same effect—

Runk v. St. John, 29 Barber, 585;
Pew v. Hurtt, 52 How. Pr. 22;
Stoddard v. Lum, 159 N. Y. 265;
45 L. R. A. 551;

Winans v. Gibbs, 48 Kan. 770, *780;*
Robertson v. Stead, 135 Mo. 139;
36 S. W. Rep. 610;
Castleton v. Templeton, 87 Md. 546;
Hurd v. City of Elizabeth, 41 N. J. L. 2;
Swing v. Mentley, 45 W. Va. 283;
Bank v. McLeod, 46 Ohio St. 174;
Metzner v. Bauer, 98 Ind. 425;
Boulware v. Davis, 99 Ala. 214;
Ins. Co. v. Wright, 55 Vt. 526;
Weil v. Bk., 76 Mo. App. 34;
Hale v. Tyler, 104 Fed. Rep. 757;
Small v. Smith, (S. Dak.) 86 N. W. 649.

The stinging commemt of Mr. Thompson, in his work on corporations, directed against one of the cases denying a right to sue, we think is fully justified. He says:

"The reading of such a decision makes one's blood tingle, and almost forces the wish that the Civil War had resulted in sponging out State lines and abolishing the tribal theory of our government entirely."

6 Thomp. Corp., bottom p. 5844.

Booth v. Clarke, 17 How. 322, Considered.

This case is of very doubtful application to the case at bar. A number of reasons for the conclusions there reached are discussed at some length, without it being anywhere stated which one is controlling, and it is doubtful if any of such reasons thus discussed have any application to this case.

Much stress is laid upon the laches of the receiver in commencing his action in the District of Columbia:

"The matter was allowed to rest for seven years, Camara being aware that Clark had a pecuniary claim upon the

Republic of Mexico, at least as early as in the year 1843. The receiver during all this time took no action."

And further on in the opinion the court says:

"There was a want of vigilance in this matter, which does not make any equity which he may have in New York upon Clark's property superior to that of Clark's creditors who are pursuing the funds in this district."

This reason, of course, can have no application to the case at bar.

Furthermore, it appears from the quotation just made that there was a question of conflict between the several creditors of Clark, and a question of priority between creditors, which raised a question of superior equities. In stating the point to be decided, the court said:

"In other words, as an officer of the Court of Chancery for a particular purpose, will he be recognized as such by a foreign judicial tribunal and be allowed to take from the latter a fund belonging to a debtor for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues contesting his right to do so? Or, can he as a receiver claim, in virtue of a decree upon a creditor's bill given in one jurisdiction, a right to have the judgment upon which the creditor's bill was brought paid out of a fund of a bankrupt debtor in a foreign jurisdiction because his appointment precedes the bankrupt petition?"

It thus appears that the rights of the creditors of Clark in the District of Columbia were largely controlling. Of course this reason can have no application to the case at bar, because under the statute under which this action is maintained the receiver is the statutory agent for all the

creditors, and the only person authorized to sue. If he cannot maintain an action in a foreign jurisdiction, the stockholder's liability is destroyed by indirection; there is a simple denial of justice. Under modern economic conditions it rarely occurs that any considerable number of the stockholders of a corporation reside in its domicile. And if the general rule is to prevail that a receiver cannot sue under the act in question outside of Kansas, the stockholder liability is practically wiped out.

Another question considered by the court with great care was, whether or not the laws of New York intended to confer upon receivers, in case of creditor's bill, authority to sue in a foreign jurisdiction, and the court reaches the conclusion that it was not so intended.

"Whatever may be the receiver's rights under a creditor's bill to the possession of property of the debtor in the State of New York, or the permission that may be given to him to sue for such property, we understand the decisions of that State as confining his action to the State of New York."

Of course, if, under the laws and practice of New York, he was not intended to be clothed with authority to sue in the District of Columbia, it is quite clear that he could not maintain the action.

It is apparent, however, in the case at bar, that the statute of Kansas in question intended to confer upon the receiver authority to sue stockholders wherever found, whether within or without the state. "Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscription of the stock of such

corporation, together with the additional liability of such stockholder." (Sec. 14 of the act in question.

In this respect the case at bar is much more nearly parallel to the case of Relf v. Rundall (105 U. S. 222) than Booth v. Clark. In the former case it was said:

"Relf is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was in fact the corporation itself for all the purposes of winding up its affairs."

This might be paraphrased to apply to the case at bar as follows:

"While Evans is an officer of the United States Circuit Court for the district of Kansas, he is yet, nevertheless, the person designated by law to take the fund created by the stockholders' liability of an insolvent corporation and hold and dispose of it in trust for the use and benefit of creditors and other parties interested. The law which clothed him

with this trust is, in legal effect, part of the charter of the corporation, inasmuch as section 1 of article 12 of the constitution of the State of Kansas reserved to the legislature the power at any time to amend or repeal charters. He was the statutory successor of the corporation for the purpose of winding up its affairs, including the collecting and distributing of the stockholder's liability. He is the trustee of an express trust, with all the rights which properly belong to such a position. His authority does not come from the decree of the court but from the statute. He appeared in New York not by virtue of any appointment of the court, but as the statutory successor of a corporation."

In the case under consideration a narrower view is probably taken of the extent of the doctrine of comity than now prevails. Whether this narrow view was justified by the peculiar facts of that case, it is not necessary to discuss at length, but certain it is that a very liberal rule now prevails in this court as to the scope and extent of the doctrine of comity in proceedings to enforce contractual liabilities. (Whitman v. The Bank, 176 U. S. 559.)

That the courts respond, and properly so, to changing social and economic conditions, is an indisputable fact; and nowhere is it better illustrated than in the discussion of the question now under consideration. To deny the right of the receiver to sue in a foreign jurisdiction fifty years ago would not to any marked extent have impeded the orderly administration of justice. To-day it is quite the reverse. In the language of the Court of Appeals of New York—

"There is a close business connection between the citi-

zens of the different States of the Union. Investments are freely made in other States by the citizens of this State who need the aid of the court of the jurisdiction where the investments were made. The comity which we expect to have extended to citizens of our State we cannot in justice refuse to citizens of other States. State lines should not prevent justice from being done. Our courts should not close their doors to a receiver from another State who comes here armed with the title to a just claim against the citizens of this State, and offers to establish by common-law evidence the liability of that citizen."

Howarth v. Angle, 162 N. Y. 179, *192*.

This language is especially forcible when we bear in mind that the question there under consideration was in all respects identical with the question here under consideration, and that it is the opinion of the court of last resort in the State from which this case comes; that to establish a contrary rule in this court for the guidance of the federal courts in New York would be to produce a direct conflict between the two classes of courts in that State. Furthermore, great stress was laid in Booth v. Clark upon the authority of certain New York cases which were deemed to be applicable to the right of a receiver to sue in that case under the peculiar circumstances of that case.

Another case illustrative of the modern tendency to a liberal rule, and one which should have great weight with the court, is Howarth v. Lombard, 175 Mass. 570. This case is also in all respects directly in point. The court says:

"In the present case the receiver is called by the court in Washington a *quasi* assignee for creditors. He is

charged with the administration of a trust fund, which does not take form or come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors he is the owner of the legal title to this fund as a trustee for creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now or who ever could legally demand and collect the money."

The most recent case by a State court is Small v. Smith (South Dakota), 86 N. W. Rep. 649, in which it is held:

"The receiver of a foreign corporation appointed by the courts of a foreign jurisdiction is entitled to maintain an action for the recovery of realty in the possession of a resident of the State where no rights of resident creditors intervene."

Question III should be answered in the affirmative.

COMMENTS ON BRIEF OF DEFENDANT IN ERROR.

We respectfully submit, that the first ten and one-half pages of the brief of defendant in error are devoted to the discussion of questions not propounded by the Circuit Court of Appeals. This court is not asked to give any opinion as to whether or not the maintenance of this action would cause the act in question to operate retrospectively, and, if so, whether the act does in fact so operate. If the contention of defendant in error is correct, that this act by its very terms was not intended to and does not apply to the class of cases to which the case at bar belongs, then it is manifest that the act is not unconstitutional in this case nor as to this defendant; and for this reason alone the first

question must be answered in the affirmative and the second in the negative. This but serves to illustrate and demonstrate that the Court of Appeals is not asking the opinion of this court upon the questions discussed under "Point 1" in defendant's brief.

Defendant in error says:

"The constitutional validity of a law is to be tested not by what has been done under it, but by what may by its authority be rightfully done under it."

What application this proposition has to the case at bar is not indicated, but we infer that he would say that the application is as follows: "I might have a defense if sued by the individual stockholder. The validity of the law is to be determined not by what is in fact true, but what might be true; therefore the law in question should be declared invalid as to me in this case."

Now this is an entirely erroneous conclusion. In support of the proposition, counsel cites Montana Co. v. Mining Co., 752 U. S. 160, *170*, in which somewhat similar language is used by this court in commenting upon the contention of one of the parties; but no application is made of the rule, and the comment simply refers to the opinion in Stewart v. Palmer, 74 N. Y. 183, *188*, and by referring to this case we find the meaning and limits of the rule announced. The legislature of New York had authorized certain special assessments *without notice*. The assessments were made without, in fact, any notice being given. The validity of the law was attacked. It was contended in defense of the law, among other things, that the assessment

had been reasonable and just, therefore the law should not be declared invalid. The count said, and very properly, that the law being invalid upon its face for want of notice was void, and that too, irrespective of the question as to whether or not the particular assessment in the particular case had been reasonable or not. Of course, if a law is void upon its face, it is void, and that is the end of the matter; but if the law is valid upon its face, but may be invalid in its operation as to a certain person under certain circumstances, the person averring such invalidity must allege and prove the facts which render it invalid as to him in that particular case.

We would further respectfully call the attention of the court to the manifold contradictions in defendant's brief. It is many times impossible to ascertain what his contention is: For example, near the bottom of page 6 of his brief, and in a number of other places, he contends that it is the intent of the act in question to make him liable only for his proportionate share of the liabilities: "This defendant can only be called upon to pay so much of $60,200 as may be necessary to satisfy his proportionate share of the corporate dues." (Defendant's brief, bottom page 6.)

But on page 15 and elsewhere in the brief he contends with great emphasis that the act in question not only authorizes but "*requires* the receiver to collect the whole $60,200, although the corporate dues may not amount to $1000." (Defendant's brief, page 15.)

On page 9 he contends that the act is invalid (although

no such question is propounded by the court) because there is no provision for notice to the stockholders of the appointment of the receiver; yet, at the bottom of page 6 and top of page 7 he concedes that a proceeding against the corporation binds the stockholder, and he might have cited with great propriety in support of this view —

Hawkins v. Glenn, 134 U. S. 319;
Sanger v. Uptown, 91 U. S. 56;
Glenn v. Liggett, 135 U. S. 533; and
Ball v. Reese, 58 Kan. 614.

On page 9, the defendant contends that "the costs and expenses of winding up the affairs of the corporation *may be* legitimately regarded as corporate dues." Well, if such costs and expenses are corporate dues within the meaning of the constitution of Kansas, how can the defendant complain if he is called upon to pay them, although, as a matter of fact, in this case, he is not and will not be called upon to pay them? However, near the bottom of page 14, he contends, on the authority of the case of Richmondy v. Irons, 121 U. S. 64, that the costs and expenses of receivership are "not a debt due from the corporation or from the stockholders."

At the bottom of page 7 of defendant's brief, and elsewhere, he contends that a proceeding in Kansas in which the amount of the liability of the corporation is ascertained and the proportionate share of each stockholder is indispensable to the maintenance of an action of this kind. Yet it is contended on page 15 that the act in question peremptorily required the collection of the entire stock liability

irrespective of the amount of the liability and irrespective of the proportionate share of each stockholder. What office such an adjudication could perform under these circumstances we cannot imagine.

On page 13 of the defendant's brief it is stated: "Plaintiff in error insists that the repeal of the old statute is ineffective as against Crissey, a judgment creditor, but that it is effective as to this defendant." Now, this is not a correct statement of the position of plaintiff in error. Plaintiff in error contends that the act is effective as to to Crissey, but even if it is not, his rights under the old act are all preserved by permitting him to take his chances with the receiver, and if the receiver sues first he has lost his rights under the old act. That his right under the old act was a right of diligence only.

On the same page of the brief it is contended: "The question whether or not the defendant can urge the invalidity of the legislation is not before this court at this time." In this the defendant in error is mistaken. The question of the Court of Appeals is: "Do sections 14 and 15 aforesaid contravene the constitution of the United States by impairing the contractual liability of the *defendant* previously existing as a stockholder of a corporation of the State of Kansas?" In other words, is the act unconstitutional as to the *defendant?* Are the *defendant's* constitutional rights impaired? The Court of Appeals is not asking whether the act is or might be unconstitutional as to John Doe or some other person in some other lawsuit,

but whether it is constitutional as to Andrew J. Nellis in this lawsuit.

Some stress is laid upon the fact that the receiver was appointed before the act was passed, but it is to be observed that the receiver was appointed exactly in the manner and under the circumstances indicated in the statute. That the passage of the law was brought to the attention of the court appointing the receiver, and "an order was duly given and made in and by said Circuit Court of the United States for the District of Kansas, First Division, by which order it was considered, adjudged, ordered and decreed that said John H. Evans, as receiver, proceed against all or any of the stockholders," etc.

It certainly would have been an idle formality to have the receiver reappointed after the passage of the act.

It is contended that there was no sufficient order of the court appointing the receiver authorizing him to sue, but no order was necessary; his powers flow from the statute, and the order was obtained in this case only because the receiver had been appointed prior to the passage of the act and to the end that the receiver might be advised whether the Circuit Court deemed it his duty to proceed under the new act.

The authorities cited on page 19 of defendant's brief not only wholly fail to sustain the contention there made but strongly tend to sustain the contention of plaintiff on several points. Thus in Swing v. Lumber Co. (91 Wis. 517, *522*) it is said:

"The rule is quite general that he may not sue without first having obtained in some form leave of the court *unless authorized by the statute to bring actions.* Where the right of such an officer does not rest merely upon his appointment by the court of another State, but there has been an assignment to him, in his official capacity, of the property in question, or *by virtue of the statute of such State* the title to the property is vested in him, *he may, it seems, sue and recover the same, not strictly by virtue of his appointment but by reason of title, he being considered for that purpose substantially an assignee.*"

We respectfully submit that questions one and three should be answered in the affirmative, and question two in the negative.

L. A. STEBBINS, TOPEKA, KANSAS,
C. J. EVANS, TOPEKA, KANSAS,
P. TECUMSEH SHERMAN, 59 WALL ST., NEW YORK,
S. B. STANTON, 59 WALL ST., NEW YORK,
Attorneys for Plaintiff in Error.

8385

SUPREME COURT OF THE UNITED STATES.

JOHN H. EVANS, as Receiver, etc., Plaintiff in Error, vs. ANDREW J. NELLIS.	No. 278. Brief by Defendant *pro se*, Johnstown, N. Y.

Writ of Error to the Circuit Court of the United States, for the Northern District of New York, from the United States Circuit Court of Appeals, Second Circuit.

Pending the appeal, the latter Court certifies certain facts to this Court, and thereupon desires instructions upon the following questions of law:

First: Are sections 14 and 15 of the Laws of Kansas of 1899 valid legislation in view of the provision of the Constitution of the State of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than "dues from corporations"?

Second: Do sections 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas?

Third: Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the Circuit Court of the United States for the Northern District of New York?

POINTS.

I.

The legislation in question is valid; provided, that:

1. It was not intended to operate retrospectively;

2. It does not authorize an action at law against a stockholder in a jurisdiction foreign to the corporation's domicile to recover an amount equal to his stock at par value, irrespective of the corporate dues, or of the aggregate corporate stock;

3. The laws of Kansas require notice of the application to select and appoint the receiver to be given to those (creditors and stockholders) interested in such selection and appointment.

"A construction should be given, if possible, to this statute that will render it free from constitutional objection; and the

presumption must be that the legislature intended to grant such rights as are legitimately within its power. It ought never to be assumed that the law-making department of the government intended to usurp or assume power prohibited to it. And such construction, if the words will admit of it, ought to be put on its legislation as will make it consistent with the supreme law."

Grenada Co. Supervisors v. Brown, 112 U. S., 261, 270.

"It is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law."

Presser v. Illinois, 116 U. S., 252, 268.

(*a.*) *The statute repealing the former law upon the subject and enacting this new law on the 11th January, 1899, (Certf. p. 3, fol. 4), more than one year after the judgment described in the certified facts was rendered and execution thereon was returned unsatisfied (Id. p. 1, fol. 2), was not intended to operate retrospectively.*

Mr. Crissey recovered his judgment against the corporation and had execution returned unsatisfied thereon on the 31st day of December, 1897, or soon thereafter (Id. p. 1, fol. 1). He then had a vested right of action against this defendant to recover the amount of that judgment; and if this defendant had a counterclaim or an affirmative defense which he could urge against Mr. Crissey, he had a vested right then, on the 31st day of December, 1897, to urge that counterclaim or affirmative defense in any action which Mr. Crissey might have brought against him.

Whitman v. Nat'l Bank of Oxford, 176 U. S., 559.
Steffins v. Gurney, 61 Kan., 292, 294.
Brigham v. Nathan, 62 Kan., 243, 248.

"'Any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.' McCracken v. Hayward, 2 How., 612; Cooley, Const. Lim., 285. Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving, only, those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice. Cooley, Const. Lim., 362–369."

Pritchard v. Norton, 106 U. S., 124.

"Words in a statute ought not to have a retrospective opera-

tion, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will effect or interfere with their antecedent rights, services and remuneration; which is so obviously improper that nothing ought to uphold and vindicate the interpretation but the unequivocal and inflexible import of the terms and the manifest intention of the legislature."

United States v. Heth, 3 Cranch, 399, 413.
Cook v. United States, 138 U. S., 157.
United States v. Burr, 159 U. S., 78.

" 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective.' "

Sturges v. Carter, 114 U. S., 511; quoted from Mr. Justice Story in Society v. Wheeler, 2 Gall., 139.

"It is always to be presumed that the law was intended, as is its legitimate office, to furnish a rule of future action to be applied to cases arising subsequent to its enactment. A law is never to have retroactive effect unless its expressed letter or clearly manifested intention requires that it shall have such effect. If all its language can be satisfied by giving it prospective operation, it should have such operation only."

N. Y. etc. R. R. Co. v Van Horn, 57 N. Y., 473, 477.
Germania Savings Bank v. Suspension Bridge, 159 N. Y., 362, 369.
Dash v. Van Kleeck, 7 Johns., 499.
Geneva etc. Ry. Co. v. N. Y. C. etc. R. R. Co., 163 N. Y., 228, 232.

"The legislature has control of remedies by which final judgments may be obtained, but cannot confiscate, recall or put again in jeopardy the rights and property established by judgments already obtained."

Matter of Greene, 166 N. Y., 485, 492.

There is not one word in the statutes or in the entire body of the law of which the statutes in question form a part to indicate that the legislature intended that the statute was to have retroactive effect. On the contrary, every word of that statute and of every statute which should be read with it shows that the intent of the legislature was that it should be a rule for future cases to govern rights not yet vested. The phrase in the statute, If any execution shall have been issued—does not refer to the time of the statute's enactment but to the future time when

upon proper application to the court "a receiver *shall be* appointed."

See Statutes cited at page 3 of Certificate.

Before this statute, it had not only been decided by this court that the individual creditor having execution unsatisfied upon a judgment of a competent court, recovered against the corporation, could pursue the individual stockholder in any jurisdiction of the United States, but it had also been decided that the stockholder liability could not be enforced by the receiver in his own name, or in the name of the corporation. It was not an asset of the corporation.

Mech. Savings Bank v. Fidelity etc. Co., 87 Fed., 113.
Hancock Nat'l Bank v. Ellis, 172 Mass., 39, 45.
Evans v. Nellis, 101 Fed., 920.

A statute of Kansas, then and still existing, provided that in the construction of the statutes of the state, "the following rules shall be observed, unless such a construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: *First*, The repeal of a statute does not revive a statute previously repealed, nor does such repeal effect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

Gen'l Statutes of Kansas, 1899, Sec. 66.

Under this statute it has been held by a Federal Court that the Laws of 1899, Chap. 10, in question here, do not affect the right of the creditor to sue.

Kisseberth v. Prescott, 95 Fed., 357, citing
State v. Boyle, 10 Kan., 113.
State v. Crawford, 11 Kan., 32.

Plaintiff in error has the burden of satisfying the court that the statute has a retroactive effect.

O'Reilly v. Utah, etc. Co., 87 Hun, (N. Y.) 406, 412.

In his brief, he admits that Mr. Crissey, the judgment creditor, has the right to recover the amount of his judgment against this defendant under the old statute, provided this defendant has not paid the amount of his liability to the receiver, and also provided Mr. Crissey had proceeded before the receiver did.

(*b.*) *The statute in question does not authorize an action at law against a stockholder in a jurisdiction foreign to the corporation's domicile to recover an amount equal to his stock at par value, irrespective of the corporate dues or of the aggregate corporate stock.*

It is settled law that the constitutional provision, in so far as it is self-executing, operates in favor of creditors as a class

Since respondent's brief was printed and filed in this Court, the Kansas Supreme Court has decided that, under the law in question (Chap. 10 of 1898), the proceeding to collect from stockholders of a corporation a judgment previously obtained against the corporation is an equitable proceeding, and all stockholders within the jurisdiction must be made parties, to the end that all debts of the corporation may be adjudged, and assessments made sufficient to satisfy such debts.

Waller vs. Hamer, 69 Pac. 185.

and collectively, and against stockholders as a class and collectively. It secures the dues from corporations through the individual liability of stockholders in the interest of all the creditors alike.

Nat'l Bank of Oxford v. Whitman, 176 U. S., 559.
Woodworth v. Bowles, 61 Kan., 568.

In Woodworth v. Bowles (supra) the Supreme Court of Kansas, per Doster, C. J., said, referring to the old provisions of the law quoted in the certificate and repealed by the new law: "However, back of these statutory provisions which thus mark out the remedies to be adopted by the creditors of corporations for the recovery of their demands against its stockholders, lies the constitutional provision before quoted, which, independently of all legislation upon the subject, must be allowed self-operative force as the terms employed indicate the framers of the organic law intended it should be. If the legislative enactments are not up to the requirements of the constitution, and if the constitution be self operative to the ends sought to be reached, this court must carry out the mandate of the organic instrument. It is evident that, if the constitutional provision be self-executing, it operates in favor of creditors as a class and collectively, and against stockholders as a class and collectively. If the constitution itself secures dues from corporations through the individual liability of stockholders, it secures them in the interest of all the creditors alike. In such event the provisions, being declarative of a rule of general right and of general liability, would of necessity assert itself through the legal forms adapted to its ends. Those ends, being equality of right and equality of liability, could be reached only through the equity procedure of the courts. Although the legislature might rightfully devise a mode of procedure adapted to the end in view, yet, in the lack of such legislative enactment the constitution, through its self operative force, would seize upon and appropriate to its purposes such general forms of action as had been already provided for similar cases, and in such event the petition of the plaintiffs in court below might be maintained." (The action was in equity by a creditor of the corporation in behalf of himself and other creditors against the stockholders to recover the additional stockholder liability, or so much thereof as might be necessary to pay corporate dues).

Mindful of the constitutional provision and desiring to enact a procedure which would give it effect and provide for equality of right among the creditors and equality of liability among the stockholders, the sections in question were enacted in which, on the return of an execution unsatisfied, the corporation was "put out of commission" It could do no new business, create no new liabilities, and a receiver was provided for, who, in behalf of all the creditors as a class, should bring action against all stockholders as a class to recover, not the entire stockholder liability, but so much thereof as might be necessary to pay the

corporate dues ; that action, of necessity, must be in equity and within the jurisdiction of the corporation's domicile ; for it has been held over and over again that a bill in equity cannot be maintained in a foreign jurisdiction to enforce the statutory liability of a stockholder in a corporation organized under the laws of Kansas.

Terry v. Little, 101 U. S., 216.
Horner v. Henning, 93 U. S., 228.
Terry v. Tubman, 92 U. S., 156-161.
Pollard v. Bailey, 20 Wall., 520.
Fourth Nat'l Bank v. Francklyn, 120 U. S., 747.
State Nat'l Bank v. Sayward, 86 Fed., 45.
First Nat'l Bank v. Dillingham, 147 N. Y., 603.
Marshall v. Sherman, 148 N. Y., 9.
Bank of North America v. Rindge, 154 Mass., 203.

It will not do to say that such a construction is not competent because the stockholders of a corporation may not be within the jurisdiction of the courts of Kansas, for it is settled law "that where the corporation is created by the laws of a state, the legal presumption is, that its members are citizens of the state in which alone the corporate body has legal existence."

National Steamship Co, v. Tugman, 106 U. S, 118; quoting Ch. J Taney in R. R. Co. v. Wheeler, 66 U. S., (1 Black) 296.
R. R. Co. v. Letson, 2 How., 497.

Perhaps, too, after the exact corporate dues had been determined in a proper action in a court of the corporation's domicile, a receiver or other officer duly appointed by that court might be permitted to maintain an ancillary action at law in a foreign jurisdiction against a non resident stockholder for the benefit of all creditors to recover his fair share of the dues so established. (Hale v. Hardon, 95 Fed., 747, 754). Otherwise, an action at law against a stockholder to recover upon his added liability cannot be maintained.

The new statute simply reiterates the constitutional provision so far as added liability is concerned ; and provides that such liability "be considered an asset of the corporation in the event of insolvency and to be collected by a receiver for the benefit of all creditors." (Certf p. 3, fol. 5, Sec. 46). The intent of the legislature is manifest ; to provide for equality of right among the creditors and equality of liability among the stockholders. Therefore, under the well settled and leading case of Pollard v. Bailey (*supra*), this defendant can only be called upon to pay so much of $60,200 as may be necessary to satisfy his proportionate share of the corporate dues. His share of the burden must first be determined in an appropriate action in equity. If the defendant could not be made a party to such action, he doubtless would be so represented therein by a receiver of the corporation (competently selected and appointed)

as to be bound by the ascertainments therein of the corporate dues, and his proportionate share thereof, or so as to make such ascertainment, at least *prima facie*, competent against him. Then the action at law in a competent court of his domicile could only proceed against him for such proportionate share; and all the facts as to appointment of receiver, the proper suit in equity, and the ascertainments made therein, would have to be alleged and proved before he could be held liable. The certified facts do not disclose any such procedure. On the contrary, they impliedly negative its existence. "The proportion of the indebtedness with which the stockholder is to be charged can be ascertained only upon taking an account of the debts and stock of the corporation; and a court of equity is the proper tribunal to bring before it all necessary parties for that purpose."

Mills v. Scott, 99 U. S., (9 Otto) 25, 29.

It is respectfully insisted that under the new statute (using the language of Mr. Ch. J. Waite in Pollard v. Bailey, *supra*) each stockholder is bound for the debts in proportion to his stock; his liability is limited to an amount equal to the par value of his stock; and he is not bound absolutely for the payment of the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more. For the purposes of this case it is not necessary to decide what effect the insolvency of any of the stockholders might have upon such as are solvent. It is certain that no stockholder is liable for more than his proportion of the debts This proportion can only be ascertained upon an account of the debts and stock and the *pro rata* distribution of the indebtedness among the several stockholders. The proper action, therefore, to enforce the liability is one in which such an account can be stated and distribution made Such an action called especially for the exercise of the powers of the court of equity which could bring before it all the necessary parties and adjust all their rights. Every stockholder, when called upon to perform his obligations, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders as that to the creditors. Otherwise, he might be made to respond to the creditors under that rule and obtain his relief from the other stockholders under another. The provision, therefore, for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it.

The ascertainments of the debts and assets of the corporations are necessary preliminaries to a recovery in an extra-territorial proceeding against non-resident stockholders to enforce extra-territorially the individual stockholder liability created by statute; and to entitle the creditors, or the parties representing them, to judgment, it is incumbent upon plaintiff that the as-

certainments intended by the statute have been made ; and he should show by record or otherwise that they have been made in a comprehensive proceeding in the parent forum with the necessary parties to that end.

Hale v. Hardon, 95 Fed., 747, 754, 755.

While section 32 of the statute (Certf. p. 3, fol. 5) directs the receiver to immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders, equal to the par value of the stock held by each, it does not direct him to proceed at law against any stockholder to collect the whole of his added liability ; nor do the provisions following in the section indicate that the legislature intended the receiver should proceed at law to recover the whole of the stockholder's added liability, irrespective of the amount of the corporate dues. The statute should be construed liberally, to the end that that should be done which ought to be done ; it should be held to intend an available remedy, but one which conformed to the requirements of the general rules of equity jurisprudence.

The principle of comity is always administered in accordance with equity. In the construction of the Kansas constitutional provision and statutes in question, the case of Woodworth v. Bowles, *supra*, is controlling authority, except in so far as a question of the Federal Constitution is involved. In the case cited the state constitutional provision is clearly construed and elucidated. The new statutory provision is the same as the constitutional one. It differs only in making the stockholder added liability an asset of the corporation in the event of its insolvency. Following the Kansas Supreme Court in the construction of these provisions, and applying equitable considerations, it cannot be held, for example, that where an execution is returned unsatisfied upon a claim of $100, the only debt of the corporation having a thousand stockholders, each holding stock of the par value of $100,000, that the receiver could pursue any single stockholder in a foreign jurisdiction, at law, and recover and carry to the state of Kansas $100,000.

Counsel for plaintiff in error, urging the validity of the legislation, contend that thereby an action at law in a foreign corporation is not contemplated to recover the entire amount of the stockholder's added liability, irrespective of the corporate dues; but they insist, illogically as it seems to the defendant, that in this action at law to recover defendant's entire added liability, it is matter of equitable defense that only a portion thereof is required to pay all the corporate dues, and that it is wholly immaterial under the statute whether or not there are other stockholders who are also liable. They seem to think and to argue that in an action at law against one stockholder in one jurisdiction, the corporate dues may be determined to be a certain sum and in another action at law in another jurisdiction

against another stockholder, they may be determined to be a different sum; and yet the statute contemplates that in the windup, the rights of contribution between the stockholders shall be somehow established and protected. Are, then, the corporate dues to be ascertained afresh and perhaps established at an entirely different amount at the suit of one stockholder against others for contribution?

(c.) *But the validity of the legislation in question may be successfully attacked, because the statute laws of Kansas do not provide that the creditors of the corporation and the stockholders thereof should have notice of the application for the selection and appointment of the receiver. The procedure enacted, therefore, is not due process of law.*

The cost and expenses of winding up the affairs of the corporation may be legitimately regarded as "corporate dues". The receiver is given large discretion to represent the corporation, its stockholders and the creditors of the corporation. While the corporation is deemed insolvent, *it may be* solvent and stockholders are equally interested with creditors in winding up its affairs. Manifestly, the receiver's appointment could not be had in the action which proceeded to judgment upon which the execution was returned unsatisfied. It must be that he is to be appointed in an independent proceeding instituted in the same court in which the judgment was recovered; that proceeding could only be instituted upon notice to those entitled to be heard; and the statute authorizing the procedure or other statutes *in pari materia* must not only authorize, but require, notice to be given, not alone to the corporation, but to the creditors whose rights, and to the stockholders whose rights and liabilities, are thereby likely to be materially affected. The stockholders, as to the added liability, after execution returned unsatisfied, are no longer bound by a proceeding in which the corporation is represented, because the corporation is dissolved by law; and the added liability of the stockholders is only an equitable asset of the corporation solely for the benefit of its creditors. The collection of this asset is not an incident of the usual proceedings to liquidate the corporation's affairs The new legislation makes that which was the individual right of the creditor an equitable asset of the corporation itself, to be collected by this receiver for the benefit of all the creditors. The constitutional provision securing corporate dues being self-executing, and the old statutes controlling the matter being repealed any creditor using the equitable procedure customary in courts of general jurisdiction within the State of Kansas upon the insolvency of the corporation might have brought an action for himself and other creditors to enforce the stockholder liability. The legislature directing that a man, perhaps not a creditor, should be selected by the court to enforce this constitutional right, ought to have provided for a hearing in which the creditors and stockholders might have had a voice in the

selection and appointment of the receiver. The statute itself provides for no notice, and no general statute of Kansas provides for notice of such an application to all persons interested.

Due process, therefore, in the selection and appointment of such a receiver implies notice and a hearing at least to the creditors to be affected.

Orchard v. Alexander, 157 U. S., 372, 383.

No judgment of a court is due process of law if rendered without notice to the party.

Scott v. McNeal, 154 U. S., 34, 46.

And any statute which provides a means of enforcing a constitutional right and delegates such enforcement to a person other than the possessor of the right and vests the person so delegated with large discretionary powers in the enforcement of that right without giving the owner of the right an opportunity to be heard in the selection of the person so delegated, is invalid legislation. It *is* more than a provisional remedy like the appointment of a receiver in an action; and, therefore, the *statutory* receiver ought not to be selected without notice.

Elwood v. Nat'l Bank, 41 Kan., 475, 478.

II.

If this action be within the scope, meaning and intent of sections 14 and 15 of Kansas Laws of 1899, then those sections are not valid legislation.

The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be rightfully done under it.

Montana Co. v. St. Louis Mining and Milling Co., 152 U. S., 160, 170.

Plaintiff's counsel contend that the validity of legislation is always a question of fact, and that the one attacking its validity has the burden of proving the facts upon which the statute may be determined to be invalid as against him; that the statute is voidable, only; and that no one can be heard to attack it unless the court first determine that facts exist by reason of which, if the legislation were held to be valid, he would be necessarily and certainly injured. Under this contention, whether or not legislation were valid and in harmony with constitutional provisions would be a question of fact to be determined by the jury. It is sufficient, as defendant contends, if facts are shown to exist which place the defendant asserting the invalidity of the legislation in a class which *might be* affected by such legislation, and that the only limitation upon the right of any citizen

to urge the unconstitutionality of a statute is that he must belong to a class which *might be* injured thereby.

Red River Valley Nat'l Bank v. Craig, 181 U. S., 548, 558.

The facts for consideration by this court are: That E. B. Crissey is a judgment creditor to the extent of $6,848.65, and had execution unsatisfied on the 31st December, 1897, (Certf. fol. 2); that defendant then owned $60,200 of the capital stock of the debtor corporation then existing (fol. 3); that plaintiff in error was appointed receiver on the 9th June, 1898, on motion of judgment creditor more than six months previous to the enactment of the legislation in question, (fol. 2).

So far as the record in this court discloses, there are no other debts.

Plaintiff's counsel contend that Mr. Crissey's rights are in nowise impaired by the new law, and if they were defendant could not complain. The obligation of the defendant's contract with Mr. Crissey at the time that he recovered his judgment against the corporation was that he would pay the amount of that judgment to Mr. Crissey direct, and not to the corporation or its receiver, however appointed, and that Mr. Crissey might recover the amount at law against defendant, unless defendant had a counterclaim against Mr. Crissey which might be urged to extinguish or to reduce Mr. Crissey's cause of action; defendant might also urge affirmatively the statute of limitations and perhaps other affirmative defenses.

It is contended in their brief by plaintiff's counsel, that in this action in order to attack the validity of the legislation in question the defendant must show, and the court must determine, that the defendant *in fact had* a defence, legal or equitable, to Mr. Crissey's action; that is to say, if the defense exist, defendant must establish it here and also establish it in Mr. Crissey's action to make it available to him. If the contention be correct, nevertheless, defendant's rights are impaired. Before the statute, he could have the benefit of the defense if he satisfied the court in which Mr. Crissey sued; now, he must satisfy the court in which the receiver has brought him that he has such a defense, and then, in case Mr. Crissey brings action against him, he must again satisfy the court Mr. Crissey selects that he has the defense. Are not, then, the means of enforcing that defense impaired by the new statute? Even adopting the reasoning of counsel for the plaintiff:—Before the new statute defendant had a vested right to interpose the defense in Mr. Crissey's action and that would have ended it if the defense were successful. Under the new statute and according to plaintiff's contention, defendant must have the existence of the defense established in this action, and if thereby he defeats the plaintiff, Mr. Crissey is at liberty to sue and he must establish it again in the court selected by Mr. Crissey. The contention is absurd.

The real questions are: May the antecedent rights of stockholders in this corporation, as a class, be impaired by this new legislation? If yea, is the defendant such a stockholder?

If *now* the stockholder is liable to be sued by Mr. Crissey and also by the receiver, how is the pendency of the one action any defense in the other even if both actions were brought in the same forum? Mr. Crissey would sue to recover the amount of his judgment for himself; the receiver, if he recover, would or might apply his recovery to an entirely different purpose. Although the Crissey judgment were the only debt of the corporation, nevertheless in Crissey's suit thereupon defendant could not successfully maintain that because receiver had sued first, Crissey could not recover.

"The obligation of a contract, in a constitutional sense, is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legislation lessens the efficiency of this means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is, to that extent, weakened."

Louisiana v. New Orleans, 102 U. S., (12 Otto) 203.

A State Act repealing the stockholder individual liability imposed by statute is, as to debts contracted before the repeal, a law impairing the obligation of the contract within the Constitution of the United States and void.

Hathorn v. Calef, 69 U. S., (2 Wall.) 10.

When the law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights.

Fletcher v. Peck, 10 U. S., (6 Cranch) 87.

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations', as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing'" * * * "It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement." * * * "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in

any respect on its obligation—dispensing with any part of its force."

Edwards v. Kearzey, 96 U. S., (6 Otto) 595.

In Bronson v. Kinzie, 1 How., 311, Ch. J. Taney, speaking of the protection of the remedy, said: "It is this protection which the clause of the Constitution now in question mainly intended to secure."

Vested rights acquired by a creditor under the State Statute are not affected by repeal of the statute.

Memphis v. U. S., 97 U. S., (7 Otto) 284.

Indeed, the plaintiff in error insists that the repeal of the old statute is ineffective as against Mr. Crissey, the judgment creditor, but that it is effective as against this defendant, who is liable to pay the amount of the judgment against the corporation directly to Mr. Crissey. How the repeal can be ineffective against the one and effective as to the other, counsel for plaintiff fail to explain. And how it can be seriously contended that defendant yet liable to respond directly to Mr. Crissey at his suit cannot be heard to urge the invalidity of legislation, which is ineffective to destroy Mr. Crissey's right to sue him, and yet gives that right to another also, this defendant is unable to understand.

While the new legislation does not undertake to annul the liability of the stockholders to the creditors for the debts of the corporation, it does more than modify the form of remedy and the rules of evidence, and it is not a Constitutional exercise of the power of the legislature as applied to debts contracted by the corporation before its enactment within the line of cases of which Fourth Nat'l Bank v. Francklyn, 120 U. S., 747, and Vial v. Penniman, 103 U. S., 714, are examples.

But the question whether or not defendant can urge the invalidity of the legislation is not before this court at this time. If the court below had not determined that defendant had the right to have the second question answered they would not have propounded it to this court.

If this action can be maintained, defendant may be compelled to pay other than "corporate dues."

The legislature may authorize means in addition to the self-executing provision of the Constitution *to secure* the ultimate payment of corporate dues. But it cannot apply the means authorized by the Constitution to the payment of anything else than corporate dues.

Assume:

That there are one thousand stockholders in the defunct corporation throughout the United States; that in one thousand different courts the receiver had sued, in each action a different stockholder being defendant; that judgment was recovered and

execution unsatisfied in nine hundred ninety-nine of these actions; that the entire cost to the receiver was $60,200; that in this action he recovered $60,200 and applied it, with permission of the court appointing him, to the payment of such cost. Have the "*dues*" of the corporation been decreased? Has not the security provided by the Constitution for the payment of those "dues" been frittered away? Has not the defendant in error been compelled to pay a liability which was not due from the corporation when it was dissolved, and, therefore, not due from himself?

Section 14 of the Kansas Laws of 1899 certainly contemplated that after execution returned unsatisfied against the corporation and receiver appointed, the corporation itself could not incur new liabilities, but is dissolved. (Certf., p. 3, fol. 4.)

These costs and expenses of the receiver in the assumed case were all incurred after dissolution and were liabilities, not of the corporation dissolved and then in liquidation, but the aggregate of the expense of pursuing different stockholders in different courts; the expense in each case, perhaps, being the separate liability of the stockholder pursued in that case, and not of any other stockholder, nor of the corporation.

"The individual liability of the stockholders, as imposed by and expressed in the statute, is, indeed, for all the contracts, debts, and engagements of such association, but that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the bank went into liquidation; after that, there was no authority on the part of the officers of the bank to transact any business in the name of the bank so as to bind its shareholders, except that which is employed in the duty of liquidation, unless such authority had been expressly conferred by the shareholders."

Richmond v. Irons, 121 U. S., 27, 64.
Schrader v. Bank, 133 U. S., 67.
And see Ward v. Joslin, 100 Fed., 676.

It cannot be that the costs suggested are incident to the duty of liquidating the corporation's affairs. True, section 15 of the statute assumes to make the stockholder liability an asset of the corporation in the event of insolvency. But it is an *equitable* asset even if the statute be valid and only for the benefit of the creditors; and the collecting of such equitable asset cannot be regarded as within the duty of liquidating the affairs of the corporation.

In the Richmond case (*supra*) this court considered that the expenses of the receiver in that case appointed were not a debt due from the corporation or from the stockholders.

If it be claimed that such costs are dues of the corporation, then each creditor and each stockholder is vitally interested in the selection of the receiver upon whom so much depends in the enforcement of his constitutional right or liability; yet, the re-

ceiver bringing this action does not appear to have been appointed at the instance of any creditor other than the judgment creditor; nor does it appear that any other creditor has had an opportunity to be heard upon the question of his selection. Is this due process of law?

If the statute contemplate notice to creditors, then the plaintiff in error is not the receiver intended by the statute; he was appointed six months before the statute took effect, and without notice to any creditor, upon the application of a single creditor.

Under the Constitutional provision $60,200 cannot be taken from defendant in error unless it be actually necessary to pay "dues" of the corporation. The statute in question, if this action be within it, unmindful of this constitutional restriction, authorizes,—*requires*,—the receiver to collect the whole $60,200, although the corporate dues may not amount to $1,000, including the receiver's expenses.

Evans v. Nellis, 101 Fed., 920.

III.

Sections 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas.

The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement.

Murray v. Charleston, 96 U. S., 432, 449.

The defendant can and need add nothing to the able discussion upon this point contained in the decision of the learned Trial Court below, reported in 101 Fed., 920, which this defendant makes part of this argument.

Plaintiff's counsel contend that defendant contracted that the legislature of Kansas might alter, amend or repeal the charter or any law affecting the corporation. So he did; provided, however, that such alteration or amendment were valid within Constitutional limitations.

Under the statutes which formed a part of defendant's contract, he could not be held liable for any corporate dues which did not rest in judgment and have an unsatisfied execution against the corporation upon it.

Bank v. Whitman, supra.
Van Demark v. Barons, 52 Kan., 779.

The execution unsatisfied did not dissolve the corporation.

Merrill v. Meade, 6 Kan. App., 620.

The proceeding to enforce the liability was independent of the action in which the judgment was rendered—not a continuation of it, nor interlocutory or auxilliary to it.

Schnack v. Boyd, 59 Kan., 275.
Howell v. Manglesdorf, 33 Kan., 196.

IV.

Assuming the validity of the statute, nevertheless, plaintiff in error cannot maintain this action.

1. He is not the receiver appointed under the statute upon the dissolution of the corporation representing all the creditors; he represents merely the creditor at whose suit and upon whose judgment and execution returned unsatisfied he was appointed receiver. (Booth v. Clark, 58 U. S., [17 How.] 322). He was appointed six months before the statute; not because the corporation was dissolved or had become insolvent, but merely because an execution had been returned against it unsatisfied and the judgment was yet unpaid. He is a receiver only in proceedings supplementary to execution; he is merely the agent of the court; its arm, or its equitable execution, by means of which it intended to carry its judgment into effect and collect it.

The statute of Kansas authorizing his appointment is section 254 of the Civil Code, and now follows:

254. A receiver may be appointed *by the Supreme Court, the district court, or any judge of either*, or in the absence of said judge from the county, *by the probate judge.*

First. In an action * * *

Second. In an action * * *

Third. After judgment to carry judgment into effect;

Fourth. After judgment, to dispose of the property according to the judgment, or to preserve it during pendency of appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

Fifth. In the cases provided in this court and by special statute when the corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

Sixth. In all other cases where receivers have been heretofore appointed by the usages of the Courts of Equity.

(*Quere.* Does this statute authorize the appointment of plaintiff *by the Federal Court?* If not, then certainly the plaintiff is only a chancery receiver to aid the court in collecting Mr. Crissey's judgment, and for no other purpose.)

Booth v. Clark, 17 How., 322.
Hottenstein v. Conrad, 9 Kan., 436.

The appointment of such a receiver rests in the discretion of the court.

Fluker v. Emporia City Ry. Co., 48 Kan. 577.
Re Lewis, 52 Kan., 660.

A receiver is the hand of the court of which he is an officer. His appointment determines no right, does not affect the title of the property in any way, and his holding is the holding of the court.

Jackson v. King, (Kan. App.) 58 Pac., 1013.
Gableman v. Peoria, D. & E. R. Co., 179 U. S., 335.

The appointment of a receiver is in the nature of an equitable execution by which the court is able to reach only the actual interest of the debtor in the property impounded.

Longfellow v. Barnard, 79 N. W., 255; 58 Neb., 612; 81 N. W., 307.

A receiver appointed in sequestration proceedings can neither bring nor defend actions except by permission of the court appointing him; hence, such permission being the basis and a condition precedent to such right, a complaint of such receiver which fails to allege that such leave was obtained is demurrable.

Morgan v. Bucki, 30 Misc., N. Y., 245.

The right of a receiver appointed in another state to maintain an action is not absolute, but rests in the discretion of the court.

Wyman v. Eaton, 107 Ia., 214; 43 L. R. A., 695; 77 N. W., 865.

An order of appointment of a receiver which gives him authority to bring suits in other states is without efficacy to create such right without sanction in the states where the suits are brought. Id. (It is not claimed that the court in which this action is brought authorized it.)

A receiver of a corporation appointed in another state should not be allowed by an exercise of comity to sue for the enforcement of the liability of stockholders, when it would be in contravention of the rights of the citizens of the state and operate to their injury. Id.

As stated in Booth v. Clark 58 U. S., (17 How.) 322, the plaintiff is appointed under a creditor's bill, for one creditor, for his benefit, to the exclusion of all other creditors of the debtor, if there be any such, as there are in this case. Whether appointed under the statute of Kansas, or under the rules and practice of Chancery, his official relations to the Court are the same. "A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction

of the court into ability to act. He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, the privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." * * * "We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

Citing the case of Booth v. Clark, the Kansas Supreme Court recently said: "It is the established doctrine of the Supreme Court of the United States, sustained by the weight of authority in various states, that the receiver has no extra-territorial jurisdiction or power of official action, and cannot, as a matter of right, go into a foreign state or jurisdiction and there institute an action for the recovery of demands or debts due to the person or estate subject to his receivership."

Winans v. M'f'g Co., 48 Kan., 777, 780.

The certified facts do not show that the receiver was authorized, even by the Federal Court within the State of Kansas appointing him, to prosecute this particular action, but he was given a discretion to proceed against all or any stockholders, and, as the plaintiff in error may claim, in any jurisdiction. But this Court has held that a receiver cannot take charge of any proceeding in a foreign jurisdiction by commencing an action, or defending an existing action, without the *express* authority of the court whose officer he was, so as to bind any property or effects in his hands as receiver.

Pendleton v. Russell, 144 U. S., 640; Citing Booth v. Clark, (supra).

Leave to bring this particular action should have been obtained, both of the court appointing the receiver and of the court in which the action was brought. General leave to bring any action is improper.

Witherbee v. Witherbee, 17 App. Div., N. Y., 181.
Fogg v Supreme Lodge. 159 Mass., 9.
Castleman v. Templeman, 87 Md , 546.
Swing v. White River Lumber Co , 91 Wis., 517.
Rockwell v. Merwyn, 45 N. Y., 166.
Waters-Pierce Oil Co. v. American Exchange Bank, 71 Mo. App., 653.
Brigham v. Ludington, 12 Blatchf., 237.

Until the new statute passed and for six months after plaintiff was appointed receiver, he certainly could not have maintained this action. He did not possess in any sense the right of an assignee of Mr. Crissey's cause of action against this defendant. Defendant's liability was not, and could not have been, during that time, a corporate asset. Under the authorities above cited, he certainly, during that time, only represented Mr. Crissey, upon whose application he was appointed to aid the court in collecting his judgment, out of corporate property, and not to enforce an independent demand owned by Mr. Crissey.

Is it possible that this new statute could so interfere with rights thus vested as to clothe this receiver so appointed, so limited and controlled, this creature of the court's discretion, with all the powers of the statutory receiver of a dissolved corporation? Vest him with absolute title to all the property of the corporation so that the principle of comity would require his recognition in a foreign jurisdiction? Clothe him with ownership of a demand against this defendant which was not owned by the corporation but was the individual property of Mr. Crissey? Deprive this defendant of any counter-claim or affirmative defense which he might have as against Mr. Crissey? Further comment must be unnecessary.

The defendant respectfully insists that the first and third questions submitted to this august court must be answered in the negative and the second in the affirmative. It should also be decided that the legislation is invalid as subjecting stockholders to liabilities other than "dues from corporations".

ANDREW J. NELLIS,
Defendant.

Supreme Court of the United States.

No. 66.—October Term, 1902.

John H. Evans, as Receiver, Plaintiff in Error, vs. Andrew J. Nellis. | On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[December 1, 1902.]

The questions to be answered and the case on which they arise are shown in the statement of facts and resulting questions of law constituting the certificate of the court below, which is as follows:

"*Statement of facts.*

"That the Inter-State Loan and Trust Company is a corporation created and organized under and by virtue of the general laws of the State of Kansas July 22, 1885, and as such was authorized to transact business as a land mortgage company; that in or about the month of November, 1897, E. B. Crissey commenced an action against the said The Inter-State Loan and Trust Company in the United States Circuit Court for the District of Kansas, first division, to which court jurisdiction in that behalf duly appertained; that said action was duly commenced by the issue of a summons to said company; that said summons was duly served upon the said company, and that said company duly appeared in said suit by attorney and defended the same, and that such proceedings were afterwards had in said action that on the 31st day of December, 1897, a judgment was duly given and made in and by said court in said action in favor of the said plaintiff and against the said company, in and by which judgment it was decided, adjudged and decreed that there was due and owing to the plaintiff therein from and by the said company the sum of $6,792.20 and $56.45 costs, and that the plaintiff therein have and recover said sum from the said company, with interest thereon from said date at the rate of six per cent. per annum, and that the said plaintiff have execution therefor against the said company; that thereafter an execution against the property of the said The Inter-State Loan and Trust Company was duly issued out of the said court upon said judgment for the said sum of $6,792.20 and the costs as aforesaid, directed to the United States marshal for the District of Kansas, and that thereafter the said marshal duly returned said execution wholly unsatisfied for the reason that no property, real or personal, belonging to said company could be found whereon to levy the same; that thereafter and on or about the 9th day of June, 1898, upon the application of the said E. B. Crissey, the plaintiff herein was duly appointed receiver of the said The Inter-State Loan and Trust Company by the Circuit Court of the United States for the District of Kansas, first division, to which said court jurisdiction therein duly appertained, and has duly qualified and acted as such; that thereafter and on or about the 9th

day of February, 1899, an order was duly given and made in and by said Circuit Court of the United States for the District of Kansas, first division, by which order it was considered, adjudged, ordered and decreed that the said John H. Evans, as receiver, proceed against all or any of the stockholders of the Inter-State Loan and Trust Company, from whom, in his judgment, a recovery can be had to collect all of their liability as stockholders in said company, a copy of which order is hereto annexed and marked Exhibit A, and which copy the plaintiff herein prays may be considered as part of his complaint as if herein set forth in full; that the defendant is a citizen of the State of New York, and prior to the month of November, 1897, became a stockholder of said corporation and the owner of 602 shares of the capital stock thereof of the par value of $100 a share, and has ever remained a stockholder and the owner of said shares. At the time when the defendant became a stockholder of said corporation, and from that time ever since, it was provided by the constitution of the State of Kansas (sect. 2, article XII) as follows: 'Dues from corporations' (organized and existing under the laws of the State of Kansas) 'shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations nor corporations for religious or charitable purposes.' At the time the defendant became a stockholder of said corporation it was provided by the General Statutes of Kansas of 1868 (sections 32 and 44) as follows:

'SEC. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment.'

'SEC. 44. If any corporation, created under this or any general statute of this State, except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved.'

"By a law of Kansas enacted January 11, 1899, sections 32 and 44 aforesaid were repealed, and by sections 14 and 15 it was provided as follows:

'SEC. 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: SEC. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which such execution was issued, or to the judge thereof, a receiver shall be appointed to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them.

'SEC. 15. That section 46, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: SEC. 46. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors.'

"The present action was brought in the Circuit Court of the United States for the Northern District of New York by the receiver of the said The Inter-State Loan and Trust Company, appointed as aforesaid, against the defendant to recover the sum of $60,200, alleging his liability as a stockholder and the owner of the said 602 shares of the said corporation.

"Upon the foregoing facts this court desires instructions upon the following questions:

"*Questions of law.*

"1st. Are sections 14 and 15 of the laws of Kansas of 1899 valid legislation in view of the provision of the constitution of the State of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than 'dues from corporations?'

"2d. Do sections 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas?

"3d. Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the Circuit Court of the United States for the Northern District of New York?

"In accordance with the provisions of section 6 of the act of March 31, 1891, establishing Courts of Appeal, etc., the foregoing questions of law are by the Circuit Court of Appeals for the Second Circuit hereby certified to the Supreme Court."

Mr. Justice WHITE delivered the opinion of the Court.

The third question lies at the threshold, and requires to be answered before approaching the consideration of the first and second questions. This becomes apparent when it is seen that if the first and second be answered in such a manner as to sustain the cause of action, the question would yet remain whether the receiver, appointed as stated, had authority to prosecute the suit, whilst, on the other hand, if the conclusion be reached that the receiver was without power to bring the suit—irrespective of what might be the reply to the two first questions—these questions become irrelevant and the case is disposed of.

The judgment against the corporation in the Circuit Court of the United States for the District of Kansas was rendered on December 31, 1897, prior, therefore, to the enactment of the Kansas statute of 1899. So, also, the execution was issued and the receiver appointed prior to the passage of that act. After the receiver had been appointed, however, and subsequent to the passage of the act of 1899, the court entered an order, directing the receiver to proceed against "all or any of the stockholders of the Inter-State Loan and Trust Company, from whom, in his judgment, a recovery can be had to collect all of their liability as stockholders in said company." Now the authority to so direct the receiver must rest upon either the statute of Kansas of 1868, referred to in the certificate, or upon the statute of 1899. But the right of the receiver of the assets of the corporation to sue under the Kansas law to recover the liability of a stockholder, cannot be evolved from the act of 1868, since that act made the liability of the stockholder not an asset of the corporation, but an asset which the creditor of the corporation alone could recover for his individual benefit, to the extent required to pay his judgment obtained against the corporation. In *Abbey* v. *Dry Goods Company*, (44 Kansas, 415, 418,) it was said, referring to the liability under the act of 1868:

"The nature of this liabity is peculiar; it seems to have been created for the exclusive benefit of corporate creditors. The liability rests upon the stockholders of the corporation to respond to the creditors for an amount equal to the stock held by each, and it has been held that the action to enforce this liability can only be maintained by the creditors themselves in their own right and for their own benefit."

The nature and extent of the liability under the Kansas statute of 1868 was so fully reviewed and stated in *Whitman* v. *Oxford National Bank*, (176 U. S. 559,) that we content ourselves with referring to that case as conclusively demonstrating the proposition previously stated. Tested,

then, by the Kansas act of 1868, it is manifest that the receiver had no authority to bring this suit even in the courts of the State of Kansas, and he clearly, therefore, had no power to prosecute such action in the courts of another jurisdiction. Indeed, it is manifest that the suit brought by the receiver which is now under consideration was not deemed by him to be a suit under the Kansas act of 1868, since the recovery which he seeks was not the amount of the judgment rendered in favor of the creditor in the particular suit wherein the receiver was appointed, but the whole sum of the stockholder's double liability, which could only be upon the theory that the receiver was entitled to take such liability as the receiver of the corporation and as a corporate asset to pay the debts generally. In fact, the foregoing propositions might have been taken as conceded, since in the argument at bar the right of the receiver to sue was upheld, not on the ground that he was acting under the act of 1868, but that he was proceeding in furtherance of and in supposed conformity to the act of 1899. This contention being in effect rested on the proposition that although the judgment was rendered and the receiver appointed before the passage of the act of 1899, the order of the court empowering him to enforce the liability of stockholders was entered after the enactment of the act of 1899, and therefore conferred upon the receiver the authority which it is in the argument assumed, he would have had a right to exercise if appointed under that act.

The question then is, conceding *arguendo* the proposition that the receiver was appointed under the act of 1899 and in supposed conformity to it, was he authorized to prosecute this suit by virtue of the act of 1899? The import of the Kansas act of 1899 and the extent of the powers which it called into being, were decided by the Supreme Court of Kansas in *Waller* v. *Hamer*, (June 7, 1902,) not yet reported in the official reports but found in the advanced sheets of the 69th Pacific Reporter, p. 185. In that case two creditors obtained judgment in a Kansas court against a corporation. Execution having been issued and returned no property found, one of the creditors moved for the appointment of a receiver to close up the affairs of the corporation, which motion was allowed. The receiver thus appointed brought suit against a stockholder to recover his unpaid subscription and statutory liability. The defendant filed an answer and a plea in abatement, which, among other things, we quote from from the opinion of the Kansas court, asserted "that the receiver should not be permitted to further prosecute the action against him until all the stockholders were brought into court, to the end that a final ascertainment of the debts of the corporation and an adjustment and settlement of the liabilities of the stockholders to the corporation and as between themselves might be had. To this plea in abatement the plaintiff demurred, which demurrer was sustained. Thereafter, upon leave of court,

the defendant demurred to the petition for the reasons: (1) That the plaintiff had no legal capacity to institute and maintain the present action; (2) that the petition did not state facts sufficient to constitute a cause of action against the defendant; (3) that there is a defect of parties plaintiff; (4) that there is a defect of parties defendant. This demurrer was overruled, and thereafter the defendant answered." In reviewing the action of the trial court the Supreme Court of Kansas said:

"Prior to the enactment of chapter 10, Laws of 1899, the creditor of a business corporation, other than a railway or bank, might proceed against the individual stockholders only (1) by motion after judgment and execution against the corporation returned *nulla bona*; (2) by action after dissolution, either by expiration of time, judgment of dissolution, or suspension of business for more than one year, as provided in sections 32, 46, Corp. Act 1868. Chapter 10 of the Laws of 1899 repealed said sections 32 and 46, and substituted therefor sections 14 and 15."

The sections of the act of 1899 referred to are those set out in the certificate of the court below. The court then further said that it was obvious that the act of 1899 created an "entirely different remedy from that provided by the act of 1868," and declared, referring to the act of 1899, that "there exists no other statute by which the creditor of an insolvent or dissolved corporation may proceed against its stockholders. It follows, therefore, that if a creditor desires to make a stockholder respond for the debts of the corporation, he must proceed against him in the mode prescribed, and no other." Proceeding, then, to test the right of the receiver to sue, by the act of 1899, the court held that, as he had not brought a suit against the corporation and all the resident stockholders, in order in such suit to fix the sum required to pay the corporate debts, he, the receiver, was wholly without authority under the statute to make any demand whatever against a stockholder, as the previous suit to fix the sum required to pay the debts was an essential prerequisite under the statute to any action by a receiver appointed under the act of 1899 against a stockholder. Summing up its view of the act of 1899, the court said:

"This act provides a complete system for collecting the assets and paying the debts of an insolvent corporation, and of adjusting the liabilities of the stockholders between themselves. To do this the receiver must bring in all stockholders that are within the jurisdiction of the court, that in one proceeding the court may ascertain and determine the indebtedness of the corporation, the amount each stockholder should pay, and, if one has paid more than his proportion, award him such relief against the other stockholders as may appear just. The receiver having failed to comply with this plain statutory requirement, the demurrer to the plea in abatement should have been overruled."

It therefore follows that there was no authority conferred by the act of 1899 of Kansas, from which the right of the receiver to bring the suit which is now before us, can be deduced. It having been heretofore demonstrated

that there was no such right under the act of 1868, and as there is no such power under the act of 1899, it follows necessarily that the receiver was without any authority whatever, and the third question must be answered no. Of course, in answering this question we express no opinion whatever as to how far, if at all, the act of 1899 could validly operate to repeal the right of action in favor of creditors given by the Kansas statute of 1868, so far as creditors are concerned, whose debts accrued prior to the repeal. We of course also express no opinion whatever upon the question of how far the rights and remedies conferred by the act of 1899 could lawfully be enforced against stockholders in corporations who became such stockholders prior to the passage of that act. And this of course excludes the intimation of any opinion as to how far a judgment rendered in a court of Kansas in a suit brought by a receiver against the corporation and the resident stockholders, to fix the sum required to pay the corporate debts, would be binding upon non-resident stockholders not directly a party to such action especially where their subscription to stock had been made prior to the enactment of the act of 1899. The third question will be answered no, and it is unnecessary to answer the other questions.

And it is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.